136-549

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~142~~ 16 136-549

MARY ANN GIBBONS, APPELLANT,

vs.

JANE OWEN MAHON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 17, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 142.

MARY ANN GIBBONS, APPELLANT,

vs.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 7, 1888.

1 *Original Bill. Filed Mar. 7, 1884. R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant,
against
JANE OWEN MAHON, Defendant.
} Eq. No. 8914.

The complainant states as follows:

1. That she is a resident of the District of Columbia.

2. That the defendant is also a resident of the said District of Columbia.

3. That on the 26th day of March, 1865, Ann W. Smith, the mother of both the complainant and defendant, being then a widow and resident in the said District of Columbia, departed this life, having previously in due form of law made, published, and declared her last will and testament; and that the said last will and testament (a true copy whereof, marked Exhibit A, is hereto annexed and made part hereof), was, on the 8th day of April, 1865, duly admitted to probate and record in the orphans' court of the said District of Columbia.

2 4. That at the time of making, publishing, and declaring her said last will and testament, to wit, on the 11th day of February, 1865, as also at the time of her said death aforesaid, the said Ann W. Smith owned and possessed, among other goods, chattels and effects, two hundred and eighty (280) shares of the capital stock of the Washington Gas-Light Company of the city of Washington, in the said District of Columbia, a corporation duly chartered by an act of the Congress of the United States approved the 8th day of July, 1884; and that by her said last will and testament aforesaid, as by reference thereto will appear, the said Ann W. Smith, among other things, gave and bequeathed the said two hundred and eighty (280) shares of the said stock to the defendant, Jane Owen Mahon, to have and to hold the same in trust for the advantage and behoof of the complainant, and with directions to the said defendant, her heirs and assigns, to cause the dividends of the said shares, as they might accrue, to be paid to the complainant
3 during her, the said complainant's, lifetime, without percentage of commission or diminution of principal, the said shares on the death of the complainant to revert to the estate of the defendant without incumbrance or impeachment of waste.

5. That on the 10th day of February, 1866 (the said two hundred and eighty (280) shares of the said stock still remaining and standing on the books of the said Washington Gas-Light Company in the name of the said Ann W. Smith), a dividend of one (1) dollar per share on the stock of the said company was duly declared out of the net earnings, increase, income, and profits thereof, and the amount payable by reason of the said dividend on account of the said two hundred and eighty (280) shares, to wit, the sum of two

hundred and eighty (280) dollars, was duly paid by the defendant to the complainant.

6. That by the said act of the Congress of the United States
4 of the 8th day of July, 1884, aforesaid the capital stock of
the said Washington Gas-Light Company aforesaid was fixed
at the sum of fifty thousand (50,000) dollars, in shares of the value of twenty (20) dollars each; that by acts of the said Congress of the 2d day of August, 1852, and of the 3d day of January, 1855, the said capital stock of the said company was increased to the sums of three hundred and fifty thousand (350,000) and five hundred thousand (500,000) dollars, respectively, at which latter amount it stood at the death of the said Ann W. Smith aforesaid, as also at the date of the said dividend of February, 1866, aforesaid, and that by act of the said Congress of the 24th day of May, 1866, the said capital stack was further increased by the sum of five hundred thousand (500,000) dollars, thus making the said capital stock to amount as of that date to the full sum of one million (1,000,000) dollars in all.

7. That from and after the declaration of the said dividend of the
10th day of February, 1866, aforesaid the said Washington
5 Gas-Light Company from time to time declared, made, and
paid out of its net earnings, increase, income, and profits accruing since the said death of the said Ann W. Smith aforesaid other and further dividends on its capital stock; that, so declaring, making, and paying the said dividends, the said company did not, however, apportion, pay out, or in anywise distribute to the holders of the shares of its stock or on account of the said shares all of the said net earnings, increase, income, and profits of itself, the said company, or its said shares so having accrued as aforesaid, but of the said net earnings, increase, income, and profits so accruing the said company, from time to time, reserved, retained, appropriated, and set apart sundry parts and portions, the aggregate whereof, in due time, to wit, by the first day of October, 1868, reached an amount in excess of the sum of one million (1,000,000) dollars over and above the
capital of the said company, which then still remained, in
6 fact, at the sum of five hundred thousand (500,000) dollars;
that the said parts and portions of the said net earnings, increase, income, and profits so reserved, retained, appropriated, and set apart having reached the said aggregate as aforesaid, and the said capital of the said company still, in fact, remaining at the said sum of five hundred thousand (500,000) dollars, the said company thereupon, to wit, on the — day ——, 1868, awarded and distributed the said aggregate (or so much thereof as was necessary for the purpose), in the shape and form of additional shares of stock, to and among its stockholders, share for share, as they stood on the books of the said company on the said 1st day of October, 1868, by which means and no other and in which manner and no other the said capital stock of the said company was made and brought up or pretended to be made and brought up to the sum of one million (1,000,000) dollars, as in and by the said act of the 26th day of May, 1866, contemplated, provided, and fixed.

7 8. That, pursuant to and in accordance with the said action of the said company and in virtue and by reason of her ownership as aforesaid of the said first or original two hundred and eighty (280) shares aforesaid, there were awarded and distributed, as to and in the name of the said Ann W. Smith aforesaid, two hundred and eighty (280) of the new or additional shares of stock of the said company into which the said surplus of the said net earnings, increase, income, and profits aforesaid had, as aforesaid, been changed, transformed, and converted, and in the shape and form and by means of which the said surplus had so as aforesaid been awarded, apportioned, and distributed in behalf and on account of those entitled thereto; that afterwards, to wit, on the — day of January, 1869, the said first or original two hundred and eighty (280) shares and the said new or additional two hundred and eighty (280) shares, amounting together to five hundred and sixty
8 (560) shares of the stock of the said company, were transferred
on the books of the said company from the name of the said Ann W. Smith to that of the defendant, as trustee under and by virtue of the said last will and testament aforesaid, and that the said defendant as such trustee now holds the said five hundred sixty (560) shares of the said stock, and, while paying over to the complainant the cash dividends from time to time thereon declared, made, and paid, yet retains the said new or additional two hundred and eighty (280) shares so created as aforesaid out of the said net earnings, increase, income, and profits as aforesaid (which said shares are of great value, to wit, of the value of nine thousand (9,000) dollars), and, although requested, the said defendant, denying the complainant's right thereto, declines and refuses to deliver up the same to her, the said complainant.

9. That the complainant is advised that by the true intent, meaning, and interpretation of the said last will and testament of
9 the said Ann W. Smith aforesaid she, the complainant, is
entitled to receive all awards, apportionments, or distributions of what kind or character or in what form soever of or out of the net earnings, increase, income, or profits of the said company or its stock (especially of or out of such as may or shall accrue or have accrued since the death of the said Ann W. Smith) which have been or shall or may be declared, made, or paid during her natural life by the said Washington Gas-Light Company or its proper officers to or on account of the said first or original two hundred and eighty (280) shares of its said stock owned and possessed by the said Ann W. Smith at the said time of her said death as aforesaid; that, accordingly, she, the complainant, is entitled in her own right to the sole and absolute ownership, title, and control of each and every of the certain new or additional two hundred and eighty (280) shares of stock awarded, apportioned, and distributed in manner
10 aforesaid by the said action of the said company of the —
day of ——, 1868, aforesaid; and that the defendant, disclaiming the right of the complainant in that behalf, and so as aforesaid holding and retaining the said last-mentioned two hundred and eighty (280) shares of stock, the complainant is without

remedy in the premises except with the aid of this court sitting as a court of equity.

The complainant therefore prays:

1. That the true intent and meaning in that behalf of the said last will and testament of the said Ann W. Smith may by this court be duly declared, stated, and established.

2. That the defendant may be directed and required to assign, transfer, and deliver over to the complainant the certain two hundred and eighty (280) shares of stock hereinbefore designated as new or additional shares of stock) of the Washington Gas-Light Company created, &c., by the action of the said company as of
11 the 1st day of October, 1868, as aforesaid.

3. That the complainant may have such other and further relief in the premises as the nature of her case may require; and,

4. That due process may issue out of this court requiring the defendant to appear to and answer the exigency of this bill of complaint.

The defendant to this bill of complaint is Jane Owen Mahon.

RIDDLE, DAVIS & PADGETT,
Solicitors for the Complainant.

12 EXHIBIT A to Original Bill. Filed March 7th, 1884.

Last Will and Testament of Ann W. Smith.

I, Ann W. Smith, of the city of Washington, in the District of Columbia, being of sound and disposing mind and memory and resolving to make a proper arrangement of all my worldly affairs, do herein determine declare, and publish the intentions and provisions following as and for my last will and testament, and I do hereby expressly revoke and annul all former will- and testamentary declarations by me at any time heretofore made:

In the first place, I desire that after my decease my body may be decently buried by my executrix hereinafter named, and when my debts and funeral expenses shall have been paid by her I desire that the whole estate then remaining, with which I have been entrusted by a kind Providence during my lifetime, may be disposed of according to the following gifts, devises, and bequests:

13 Item. I have heretofore at one time given to my daughter, Mary Ann Gibbons, the sum of three thousand and five hundred (3,500) dollars. I hereby give, devise, and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns, two hundred and eighty (280) shares of stock of the Washington Gas-Light Company; also forty-five (45) shares of stock of the Franklin Insurance Company, both in the city of Washington aforesaid; also eight thousand five hundred (8,500) dollars in Government bonds of the Government of the United States of America, said stock and bonds or any portion of them remaining at my death a part of my said estate; to have and to hold the same in and upon the trusts and provisions following—that is to say, in trust for the advantage and behoof of

my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause
14 the dividends of said stock and the interest of said bonds as they accrue to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal; and in case of the death of the said Mary Ann Gibbons then the said stocks, bonds, and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste.

Item. I give, devise, and bequeath all the rest, residue, and remainder of my said estates, real, personal, and mixed, and of whatsoever kind it may be and wheresoever it may be situated, and to which I may be in anywise legally or equitably entitled, to my friends, William B. Todd and Benjamin Loundes Jackson, both of the city of Washington aforesaid; to have and to hold the same unto the said William B. Todd and the said Benjamin Loundes Jackson, their heirs and assigns, and to the survivor of either of them, his heirs and assigns, in and upon the trust and provisions fol-
15 lowing and none other, and for no other purpose—that is to say, in trust for the sole use and benefit of my said daughter, Jane Owen Mahon, her heirs and assigns; and that so soon as my executrix, hereinafter named, shall have settled my personal estate and paid my funeral expenses and other debts and liabilities, if any shall exist, then the said William B. Todd and the said Benjamin Loundes Jackson, trustees, both or either of them, as hereinbefore devised, their heirs, executors, administrators or assigns, as the case may be, according to the nature thereof, shall permit my said daughter, Jane Owen Mahon, for and during the time of her natural life, to receive the rents, income, and profits arising from the said rest, residue, and remainder of my said estate and appropriate the same in her own discretion, with full power and authority, notwithstanding her coverture, to dispose of the said estate and income or any part thereof by deed or last will or declaration in the nature of a last will.

16 Item. I do hereby nominate and appoint my daughter, Jane Owen Mahon, wife of said David W. Mahon, of the city of Washington aforesaid, the executrix of this my last will and testament; and in testimony of all which I, Ann W. Smith, the testatrix, do hereby set my hand and affix my seal, signature, and sealing the above and foregoing three (3) pages attached on whole and severally, and declaring them and none other to be my last will and testament, in the presence of the undersigned, my friends and witnesses, on this eleventh (11th) day of February, in the year of our Lord one thousand eight hundred and sixty-five.

(Signed) ANN W. SMITH. [SEAL.]

The above and foregoing, written on four (4) pages of paper and attached, was signed, sealed, declared, and published by the said Ann W. Smith, as and for her last will and testament, in the presence of us, the undersigned, who, at her request and in her presence
17 and in the presence of each other, have to this writing sub-

scribed our names as witnesses, in due and proper form, at the date above written.

(Signed)

WM. B. JACKSON.
JAMES Y. DAVIS.
THAD. STURGIS.

18 *Subpœna to Answer. Issued Mar.* 7, 1884.

In the Supreme Court of the District of Columbia, March 7, 1884.

Mary Ann Gibbons, Complainant,
against
Jane Owen Mahon, Defendant.
} No. 8914. Equity Docket 23.

The President of the United States to Jane Owen Mahon, defendant:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the original bill under pain of attachment and such other process of contempt as the court shall award.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*,
By M. A. CLANCY,
Ass't Clerk.

19 *Return on Subpœna to Answer. Filed March* 7, 1884.

Service accepted.

J. HUBLY ASHTON,
Attorney for Jane Owen Mahon.

March 7, 1884.

Served Jane Owen Mahon by leaving a copy with her attorney, J. Hubley Ashton (who accepted service as above), March 7th, 1884.

CLAYTON McMICHAEL,
U. S. Marshal.

20 *Appearance of Defendant. Filed Mar.* 8, 1884.

Supreme Court of the District of Columbia. In Equity.

Mary Ann Gibbons
vs.
Jane Owen Mahon.
} No. 8914.

The clerk will please enter my appearance for the defendant in the above-entitled cause.

March 8, 1884.

J. HUBLEY ASHTON.

21 *Answer of Defendant. Filed Mar.* 13, 1884. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia. In Equity.

MARY ANN GIBBONS
vs.
JANE OWEN MAHON.
No. 8914.

The answer of Jane Owen Mahon, the defendant, to the bill of complaint of Mary Ann Gibbons, the plaintiff.

In answer to the said bill I, Jane Owen Mahon, say as follows:

First, second, and third. I admit the truth of the averments in the first, second, and third paragraphs of the said bill.

Fourth. I admit the truth of the averment in the fourth paragraph of the said bill as to the ownership by the said Ann W. Smith of two hundred and eighty (280) shares of the capital stock of the Washington Gas-Light Company of the city of Washington, in the District of Columbia; that the said company was incorporated as in the said paragraph of the said bill stated, and that the said 22 Ann W. Smith bequeathed the said shares of the capital stock of the said company to me as in her said last will and testament in that behalf particularly mentioned.

Fifth. I admit the truth of the averment in the fifth paragraph of the said bill.

Sixth. I admit that by the act of Congress approved July 8, 1848, entitled "An act to incorporate the Washington Gas-Light Company," the authorized capital stock of the said corporation was fifty thousand dollars ($50,000), divided into shares of twenty dollars each; that by an act of Congress approved August 2, 1852, entitled "An act to amend an act entitled An act to incorporate the Washington Gas-Light Company, approved July eight, eighteen hundred and forty-eight," authority was given to increase the capital stock of the said company to three hundred and fifty thousand dollars ($350,000); that by an act of Congress approved January 3, 1865, entitled "An act authorizing the Washington Gas-Light Com- 23 pany to increase the capital stock of said company," the said corporation was authorized to increase the capital stock thereof one hundred and fifty thousand dollars ($150,000)—that is to say, to five hundred thousand dollars ($500,000); that by an act of Congress approved May 24, 1866, entitled "An act to amend the charter of the Washington Gas-Light Company," it was provided, *inter alia*, as follows, to wit: "That the capital stock of said company be, and the same is hereby, increased five hundred thousand dollars, subject to the same liability as is provided in the eleventh section of the original act of incorporation, approved July eighth, eighteen hundred and forty-eight;" and that by the said act of May 24, 1866, therefore the authorized capital stock of the said company was increased to one million of dollars; and I therefore admit that at the time of the death of the said Ann W. Smith, and also at the date of the said dividend of February, 1866, the authorized capital stock

of the said company, was five hundred thousand dollars ($500,000),
divided into shares of twenty dollars each.
24 Seventh. I admit that from and after the declaration of
the said dividend of the 10th day of February, 1866, the said
Washington Gas-Light Company from time to time declared, made,
and paid out of its net earnings, income, and profits accruing since
the death of the said Ann W. Smith other and further dividends on
its capital stock. I am informed and believe it to be true, and
therefore admit, that in so declaring, making, and paying the said
dividends the said company did not apportion, pay out, or distribute
to the holders of the shares of its stock or on account of the said
shares all of the said net earnings, income, and profits. I am in-
formed and believe, however, that it is not true, and therefore deny,
that of the said net earnings, income, and profit so accruing the said
company from time to time reserved, retained, appropriated, and
set apart sundry parts and portions, the aggregate whereof in due
time, or by the first day of October, 1868, reached an amount
25 in excess of the sum of one million of dollars over and above
the capital of the said company; and I am informed and
believe that it is not true, and therefore deny, that the capital of the
said company on the first day of October, 1868, remained in fact at
the sum of five hundred thousand dollars. I am informed and be-
lieve, and therefore aver, on the contrary, that the capital of the
said company on the first day of October, 1868, had become in fact
a million of dollars. I am informed and believe that it is not true,
and therefore deny, that parts and portions of the said net earnings,
income, and profits reserved, retained, appropriated, and set aside
having reached the said aggregate in the said bill in that behalf
mentioned, and the capital of the said company still in fact remain-
ing at the sum of five hundred thousand dollars, the said company
thereupon, or on the — day ——, 1868, awarded and distributed such
aggregate, or so much thereof as was necessary for the pur-
26 pose, in the shape and form of additional shares of stock, to
and among its stockholders, share for share, as they stood on
the books of the said company on the first day of October, 1868. I
am informed and believe that it is not true, and therefore deny,
that by which means and no other and in which manner and no
other the said capital stock of the said company was made and
brought up, or pretended to be made and brought up, to the sum of
one million of dollars, as in and by the said act of Congress of May
24, 1866, contemplated, provided, and fixed.

I am informed and believe, and therefore aver the facts to be, that
long before and after the death of the said Ann W. Smith, and be-
fore and after the passage of the said act of Congress of May 24,
1866 (which I am advised increased the authorized capital stock of
the said Washington Gas-Light Company and not merely em-
powered the said company to increase the same to one million of
dollars), and before the adoption, on or about the first of November,
1868, by the board of directors of the said company of the
27 resolution hereinafter recited, awarding the said increased
stock to the stockholders, share for share, as they stood on

the first day of October, 1868, the said company expended and invested parts and portions of its net earnings, income, and profits from time to time in the enlargement and extension of its permanent works and plant employed in its legitimate business under its character; that the actual cost of the said works and plant of the said company, as shown by its construction account, amounted at the dates following to the amounts following, to wit:

January 1, 1865	$842,623 02
January 1, 1866	892,224 08
January 1, 1867	935,039 55
January 1, 1868	963,803 37
July 1, 1868	988,914 84
January 1, 1869	1,039,287 17

That the whole of the said cost of the said works and plant
of the said company, over and above the amount of its authorized
capital stock issued under the said acts of Congress of
28 July 8, 1848, August 12, 1852, and January 3, 1855, at
the said dates and the intermediate dates, had been and
was defrayed and paid by the said company from and out of its net earnings, income, and profits not distributed and paid out from time to time as dividends to its stockholders; that at the time of the death of the said Ann W. Smith, on the 26th day of March, 1865, the amount so expended and invested by the said company from and out of its net earnings, income, and profits accruing prior to her death in the extension and enlargement of its said permanent works and plant was proportionately, as shown by the said account, not less than three hundred and fifty thousand dollars ($350,000); that at the time of the passage of the said act of Congress of May 24, 1866, the actual cost of the said works and plant of the said company and the amount of money expended and invested by it in the construction, enlargement, and extension of the same was not less
than nine hundred thousand dollars ($900,000), and that on
29 the first day of October, 1868, the actual cost of the works and
plant of the said company employed in its legitimate business
under its charter and the amount of money previously expended and invested by it in the construction, enlargement, and extension of its said works and plant exceeded the sum of one million of dollars ($1,000,000), and thus exceeded the amount to which the authorized capital stock of the said company was increased by the said act of Congress of May 24, 1866.

I am informed and believe, and therefore aver the facts to be, that on or about the first day of November, 1868, the directors of the said company, in view of the facts as hereinbefore stated, duly adopted a resolution in the words and figures following, to wit:

"Whereas the construction account of this company exceeds one million of dollars, and as the capital of the company has been increased by an act of Congress to one million of dollars, therefore
be it resolved that the increased stock be awarded among the
30 stockholders, share for share, as they stood on the first of October, 1868;" that the said resolution was passed in execu-

[illegible] the provisions of the said act of May 24, 1866, which expressly increased the capital stock of the said company to one million of dollars; and that after and in pursuance of the said resolution the said company made and issued certificates for twenty-five thousand (25,000) shares of its capital stock as increased by the said act of May 24, 1866, appropriating the same, *accounting* to the said resolution of the directors, among the stockholders of the said company, share for share, as they stood on the first day of October, 1868; and that under the circumstances and by reason of the facts and in the manner, and no other, herein stated, the authorized capital stock of the said company was raised to one million of dollars as increased by the act of Congress of May 24, 1866.

I am also informed and believe, and so aver the facts to be, that the said shares of the capital stock of the said company is-
31 sued, awarded, and apportioned as aforesaid, under the said act of May 24, 1866, and in pursuance of the said resolution of the board of directors of the said company, were not issued, awarded, or apportioned by the said company, in any manner as earnings, income, interest, or profits or a dividend of earnings, income, interest, or profits, or as a dividend at all, but that the same were so issued, awarded, and apportioned as aforesaid by the said company as capital and as representing part of the actual capital of the said company, then become over a million of dollars; and that the said additional stock represented and was intended to represent the accretions to the permanent property of the said corporation by the gradual improvement, enlargement, and extension of its said works and plant, as hereinbefore stated, before and after the time of the passage of the said act of Congress of May 24, 1866, and which were capitalized or authorized to be capitalized, as I am advised, by the said act of Congress.

32 Eighth. I am informed and believe that it is not true, and therefore deny, that, pursuant to and in accordance with such action of the said company as is averred in the seventh paragraph of the said bill, there were awarded and distributed, as to and in the name of the said Ann W. Smith, two hundred and eighty (280) of the said so-called new or additional shares of the said company; and that any such surplus of the said net earnings, increase, income, and profits of the said company as in the said bill in that behalf stated was changed, transformed, or converted into the said new or additional shares of the stock of the said company; and that any such surplus was awarded, apportioned, or distributed in behalf of or on account of those entitled thereto in the shape and form or by means of the said new or additional shares of the stock of the said company; and that any such surplus of the said earnings, increase, income, or profits existed at the time the said new or additional shares of the said stock were issued to be changed, transformed,
33 and converted into or to be awarded, apportioned, or distributed in the shape and form or by means of the said new or additional shares of the stock of the said company. I deny that on the — day of January, 1869, the said first or original two hundred and eighty (280) shares and the said so-called new or addi-

tional two hundred and eighty (280) shares, amounting together to five hundred and sixty (560) shares of the stock of the said company, were transferred on the books of the said company from the name of the said Ann W. Smith to my name as trustee under the said will of the said testatrix. I aver and say that on or about the 29th day of September, 1868, the said first or original two hundred and eighty (280) shares of the stock of the said company, which up to that time had stood on the books of the said company in the name of the said Ann W. Smith, were transferred on the said books to me and in my name as trustee under and by virtue of the said last will and testament
of the said Ann W. Smith; that the certificate representing
34 the said shares was then and there surrendered and delivered
up by me to the said company, and that afterwards, to wit, on or about the 17th day of November, 1868, and after and under and in pursuance of the said resolution of the board of directors of the said company, adopted as aforesaid on or about the first day of November, 1868, and the said transfer, the said company issued and delivered to me a certificate in my name as trustee, and dated October 1, 1868 (numbered 104), for five hundred and sixty (560) shares of the capital stock of the said company, which said certificate represented the said first or original two hundred and eighty (280) shares and the said so-called new or additional two hundred and eighty (280) shares of the capital stock of the said company.

I admit that I now hold and retain as said trustee said certificate for five hundred and sixty (560) shares of the capital stock of the said company, and that I have paid to the said plaintiff all
the dividends from time to time declared, made, and paid on
35 the said shares by the said corporation.

I am informed and believe that it is not true, and therefore deny again, that the said so-called new or additional two hundred and eighty (280) shares were created, as in the said plaintiff's bill in that behalf stated, out of the said net earnings, income, and profits of the said company in the said bill mentioned.

I admit that the said shares are worth nine thousand dollars ($9,000). I admit that I deny the said plaintiff's right to the said so-called new or additional two hundred and eighty (280) shares, but I deny, however, that I have ever been requested, save by her said bill, to deliver up the same to the plaintiff. I aver and say that the question of the ownership and proper legal disposition under the said will of the said testatrix, Ann W. Smith, of the said so-called new or additional shares of the said company so awarded and issued to me as aforesaid, was submitted by me or my direction to eminent counsel soon after the said transaction and before the payment by the said company of the first dividend on the said
36 five hundred and sixty (560) shares of the said stock, and I
was advised that I received and should hold the said new or additional shares in and upon the same trust as that upon which I had received and held the said original shares, accounting only to her for the said dividends thereon as declared and paid from time to time by the said company. This opinion was duly communicated to the agent of the said plaintiff at that time, who, after taking what he

[illegible] legal advice upon the subject, acquiesced in [illegible] applicable to the case, and the said agent thereafter duly receipted to me, on behalf of said plaintiff, from time to time for the amounts of the dividends paid on the said five hundred and sixty (560) shares of the said capital stock as held in trust for the benefit of the said plaintiff. The same or similar receipts were given me for the said dividends as paid from time to time by the other agents employed by the said plaintiff for the collection of the same, and no demand was ever made by said plaintiff or by any person on her behalf prior to the filing of the said bill for a transfer to her of the said so-called new
37 or additional shares of the said stock of the said company. I aver and say, further, that it was not until in or about the month of September, 1883, that I was appraised that any doubt existed in the mind of the said plaintiff or any one advising her as to her legal rights in respect to the said stock; and I thereupon applied to other very eminent counsel for a written opinion upon the construction and effect of the said will of the said Ann W. Smith as respects the title to the said so-called new or additional shares of the said stock, and I was again advised by counsel that the said shares belonged to the legatee in remainder under the said will, but subject to the trust created by the said will to cause the dividends thereon to be paid to the said plaintiff during her lifetime, and that my said action as trustee was and had been wholly and strictly conformable to the law of the case.

Ninth. I am advised that the said so designated new or additional two hundred and eighty (280) shares of the capital stock of the Washington Gas-Light Company issued to me as aforesaid under
38 the said act of Congress of May 24, 1866, and in pursuance of the said resolution of the board of directors of the said company adopted on or about the first day of November, 1868, were so issued as and were and are part of the legal capital of the said corporation as increased by the said act of Congress, and constitute part of the *corpus* of the property represented by the said stock bequeathed to me in trust as aforesaid in and by the said will of the said Ann W. Smith; that the said shares were not and are not, in law or in justice or as intended in the said will of the said testatrix, a dividend or income of the said first or original two hundred and eighty (280) shares of the stock of the said corporation so as aforesaid owned and possessed by the said testatrix at the time of her death and bequeathed to me by her said last will; that the said new or additional two hundred and eighty (280) shares of the said stock belong to me as legatee in remainder under the said will, but subject to the trust created by the said will to cause the dividends thereon or the income to be paid to the said plaintiff during her natural
39 life, and that the said plaintiff, therefore, is not entitled in her own right to the sole and absolute ownership, title, and control of the said shares or either or any of them, and is not entitled to an assignment or transfer of the same to her, as in the said bill prayed.

Having answered the said bill, I pray to be hence dismissed with my reasonable costs and charges in this behalf sustained.

JANE OWEN MAHON.

J. HUBLEY ASHTON,
Solicitor for Defendant.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Jane Owen Mahon, being duly sworn, deposes and says that she is the defendant and has read the above answer by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

JANE OWEN MAHON.

Subscribed and sworn to before me this thirteenth day of March, 1884.

E. L. WHITE,
Notary Public.

40 *Replication. Filed Mar.* 27, 1884.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
ag'st } Eq. No. 8914.
JANE OWEN MAHON, Defendant. }

The complainant hereby joins issue with the defendant.

RIDDLE, DAVIS & PADGETT,
For Complainant.

41 *Stipulation as to Hearing. Filed Oct.* 8, 1884.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
against } Eq. No. —.
JANE OWEN MAHON, Defendant. }

It is hereby stipulated between the said parties to the above-entitled cause, by their solicitors, that the complainant may have leave to withdraw her replication to the defendant's answer; that the said cause shall then be set down by the complainant for hearing on the bill and answer, and that with leave of the court the same shall be ordered to be heard in the general term in the first instance.

RIDDLE, DAVIS & PADGETT,
Sol'rs for Complainant.
J. HUBLEY ASHTON,
Solicitor for Defendant.

42 *Motion and Leave to Withdraw Replication. Filed Oct.* 8, 1884.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
against } Eq. No. —.
JANE OWEN MAHON, Defendant. }

Comes now the complainant, by her solicitors, and moves the court for leave to withdraw her replication to the defendant's answer.

RIDDLE, DAVIS & PADGETT,
For Complainant.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
against } Eq. No. —.
JANE OWEN MAHON, Defendant. }

Upon motion of the complainant, by her solicitors, it is, this 8th day of October, A. D. 1884, ordered that leave be, and it hereby is, granted the said complainant to withdraw her replication in the above-entitled cause.

W. S. COX, *J.*

43 *Order to Hear in General Term in 1st Instance. Filed Oct.* 8, 1885.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
against } Eq. No. —.
JANE OWEN MAHON, Defendant. }

Comes now the complainant, by her solicitors, and, by leave of the court first had and obtained, hereby withdraws her replication to the defendant's answer in the above-entitled cause, and the clerk will please set the said cause down for hearing on the bill and answer.

RIDDLE, DAVIS & PADGETT,
For Complainant.

In the Supreme Court of the District of Columbia.

MARY ANN GIBBONS, Complainant, }
against } Eq. No. —.
JANE OWEN MAHON, Defendant. }

By consent of parties, as evidenced by the stipulation of their respective solicitors this day filed, it is, this 8th day of October, A. D. 1884, ordered that the above-entitled cause be heard in general term in the first instance.

W. S. COX, *J.*

44 *Proceedings in General Term. Filed June 29, 1885.*

MONDAY, *June* 29, 1885.

Session resumed pursuant to adjournment.

Present: Justices Hagner, James, and Merrick.

Final Decree.

MARY ANN GIBBONS, Complainant,
vs.
JANE OWEN MAHON, Defendant.
} In Equity. No. 8914.

This cause having been set down by the complainant for hearing on the bill and answer, and having been ordered by the supreme court of the District of Columbia, sitting in equity, at a special term, to be heard in the general term in the first instance, and having been by the court in general term heard upon the bill and answer and fully argued by counsel for both parties, it is, upon consideration thereof by the court, this 29th day of June, 1885, ordered, adjudged, and decreed that the complainant's bill of complaint be, and the same is hereby, dismissed with costs; and from this decree the said complainant prays an appeal to the Supreme Court of the United States, which is allowed.

By the court:

CHARLES P. JAMES, *Justice.*

45 *Appeal Bond.*

In the Supreme Court of the District of Columbia, the 14th day of October, 1885. In Equity.

MARY ANN GIBBONS, Complainant,
vs.
JANE OWEN MAHON, Defendant.
} No. 8914.

Know all men by these presents that we, Mary Ann Gibbons and Charles E. White, are bound unto the above-named Jane Owen Mahon in the sum of two hundred and fifty (250) dollars, to be paid to the said Jane Owen Mahon, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 14th day of October, 1885.

Whereas the above-named Mary Ann Gibbons has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Mary Ann Gibbons shall prosecute her said appeal to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) M. A. GIBBONS,
CHAS. E. WHITE.

Sealed and delivered in presence of—
RICHARD E. WHITE.

Approved 16th October, 1885.

D. K. CARTTER, *Ch'f Just.*

46 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and on record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 16th day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, Jr.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 16th day of October, 1885.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 16th day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, Jr,
Assistant Clerk.

Cost of record, $12.00. Paid.

Endorsed on cover: District of Columbia supreme court. No. 142. Mary Ann Gibbons, appellant, *vs.* Jane Owen Mahon. Filed October 17, 1885.

OPINION.

By her will, dated Feb. 11th, 1865, and proved April 8th, of the same year, Ann W. Smith, of the city of Washington, bequeathed to Jane Owen Mahon (*inter alia*) two hundred and eighty shares of the stock of the Washington Gas Light Company, to hold the same in trust for the advantage and behoof of Mary Ann Gibbons, and to cause the dividends of said stock and the interest of certain bonds to be paid to the said Mrs. Gibbons during her lifetime, without percentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons the stock, bonds, and income to revert to the said Jane Owen Mahon without incumbrance.

The Washington Gas Light Company was incorporated on the 8th day of July, 1848, with an authorized capital not exceeding $50,000.00, divided into shares of twenty dollars each. By an act of Congress approved August 2d, 1852, authority was given to increase the capital to $350,000.00, and by the act of January 3d, 1855, a further increase to $500,000.00 was authorized, the shares to remain twenty dollars each. This increase, however, proved insufficient to enable the company to complete its works, and by a further act of Congress of May 24th, 1866, the charter was further amended, and the capital stock of the company was increased to one million dollars. At the time when this last-mentioned act was passed the company had expended in the construction of their works about one million of dollars, and on the first of October, 1868, the construction account exceeded one million. It thus appears that at the time the will was made the authorized capital stock of the company was only $500,000.00, divided into shares of twenty dollars each. Those shares represented the entire property, no matter what its real value was. They were only representative of the proportionate ownership of the several shareholders. The capital of the company was in its works and other property, if there was any. But the construction account, or costs of the works, having exceeded one million of dollars, the amount of the stock authorized by the act of May 24th, 1866, the directors of the company, in November, 1868, adopted the following resolution: "Whereas the construction account of the company exceeds one million of dollars, and as the capital of the company has been increased by an act of Congress to one million of dollars, therefore be it resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868." In pursuance of this resolution two hundred and eighty shares were awarded to Mrs. Mahon, the trustee under the will of the testatrix, and she has continued to hold them, under the same trust as that by which she holds the original two hundred and eighty shares, paying the dividends upon both to Mrs. Gibbons. The question presented to me, in view of these facts, is whether these additional shares belong to Mrs. Gibbons, or whether she is entitled to only the income thereof during her life, the stock itself going to the person to whom the testatrix bequeathed the original shares, after the death of the beneficiary, for life.

I can have no doubt of the answer that must be given to this question. The intention of the testatrix, as expressed in her will, was plainly to give to Mrs. Gibbons only the income of the property, or interest which she held in the Gas Company, "without diminution of principal." The language she used, in declaring the trust, was that the trustee, Mrs. Mahon, "her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal." And after her death "the said stock, bonds, and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste." This manifests an industrious care that the capital shall not be impaired, and that none of it shall be diverted from the legatee in remainder. But if the new shares are capital, or representatives of capital, as I think it is plainly the fact, and if they go absolutely to Mrs. Gibbons, the intention of the testatrix will be defeated, and the legatee for life only will take both capital and income. It should be borne in mind that there is a distinction to be made between the capital of a corporation and its capital stock. The capital may be increased, while the stock remains the same. It was so in the present case. If the capital stock of the Gas Company had never been increased beyond what it was at the death of the testatrix, the original two hundred and eighty shares would represent the same proportionate interest in the capital of the company as the aggregate of those shares and the two hundred and eighty new ones now represent. It cannot be said, therefore, that the issue of the new stock certificates was a dividend of income. It was, in effect, only a redistribution of evidence of ownership of capital. It was not ordered by the directors of the company as a dividend of income or as a dividend at all. Congress increased the authorized capital stock (not merely authorized the company to increase it), recognizing that the capital had become one million of dollars, and the directors awarded the increased stock among the stockholders, share for share, not as income, but as representing capital. The award was not called a dividend, nor was it in any proper sense a dividend, as commonly understood or as intended in the will, where the words dividend and income were used as having the same meaning. At most what was distributed under the award was representatives of capital or accretions of capital. Those accretions were enlargements or extensions of the gas works, incapable of distribution as income, and which the directors had power to capitalize, if, indeed, they were not virtually capitalized by the act of Congress. It is of no importance whether or not the accretions grew out of the earnings of the corporation from its original capital. Nothing is income to a stockholder until it is divided as income, and it is legitimate for a corporation to determine whether its earnings shall be divided among the stockholders as income or be turned into capital, provided the capital be not increased beyond the authorized limit. But if this were not so, certainly the act of Congress of 1866 authorized the company to capitalize the accretions of its property, as was done by the resolution of the directors to the extent of one million of dollars. I am, therefore, of the opinion that the new shares of stock belong to Mrs. Mahon, the legatee in remainder, but subject to the trust, created by the will, to cause the dividends thereon or the income to be paid to Mrs. Gibbons during her lifetime; the same trust as that upon which the old stock is held. I think the conclusion to which I have come is in accordance with the modern authorities generally. Such is certainly the rule in England. Thus, *In re* Barton's Trust (5 Law Report, Equity Cases, 238), where it appeared that the profits of a navigation company out of its earnings for the preceding six months were large, and the directors had applied a large part of them to the purchase of new steamers, issuing new shares of stock to represent the sum so applied, and distributing that stock among the stockholders, it was decided that the new shares were thus made capital, and that as between a legatee of the "interest, dividends, share of profits, or annual proceeds of the original shares, and legatees in remainder," they belonged to the legatees in remainder. Vice-Chancellor Wood, afterwards Lord Chancellor, said: "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare; and when the company meet and say they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so, and the tenant for life of those shares cannot complain." This case is much stronger for the tenant for life than the one before me, for the profits capitalized were those of the next preceding six months severable from the capital, whereas, in the present case, what was capitalized was the gradual enlargement of the gas works, accretions to the original capital and inseparable from it. Other English decisions are to the like effect. So in Minot *vs.* Paine *et al.* (99 Mass.), where the English and American cases are reviewed, the same conclusion was reached. There it appeared that certain railroad companies, authorized to increase their capital stock, had expended their earnings in improvements, and then issued new stock and distributed it among the stockholders. The question in the case was, as here, whether the new stock belonged to a legetee for life of the testatrix's property in the original stock, or to the legatee in remainder. The court ruled that it was the property of the latter, remarking "the money in the hands of the directors may be income to the corporation, but it is not so to a stockholder till a dividend is made; and where the company invest it in buildings and machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvenents for enlarging or carrying on their legitimate business, it never becomes income to the stockholder. The investment becomes an accretion to the capital, and it is equally so, whether they increase the number of the shares or the par value of shares, or leave the shares unaltered. Or if the number of shares is increased for purposes merely speculative, it is an increase of capital stock, and not of income."

Earp's Appeal, 28th Penn. State, 368, at first sight, may appear to assert a different doctrine, but I do not regard it as establishing the correct rule for such a case as the present, As was remarked of that case in Minot *vs.* Paine, above referred to, "the fact that the corporation has within the limits of its charter the power to withhold dividends, and to use all its funds in such a way as merely to increase its property, was not discussed." That it has such power is abundantly settled. But more than this, in Earps's Appeal, it did not appear that the earnings of the company had been applied to increase the permanent works of the corporation, or had in any way been capitalized. In this case the contrary does appear. The English and Massachusetts rule, should, I think, govern this case.

DEC. 19, 1883. W. STRONG.

Office Supreme Court U. S.
FILED.
DEC 18 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 142.

MARY ANN GIBBONS, APPELLANT,

versus

JANE OWEN MAHON.

BRIEF IN BEHALF OF THE COMPLAINANT.

HENRY E. DAVIS,
For the Appellant.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 142.

MARY ANN GIBBONS, APPELLANT,

versus

JANE OWEN MAHON.

BRIEF IN BEHALF OF THE COMPLAINANT.

I.

STATEMENT OF THE CASE.

This is an appeal from the supreme court of the District of Columbia. The cause was heard in that court on bill and answer, and the bill was dismissed; from which action appeal was taken to this Court. (Rec., 14, 15.) The Court's opinion is printed as an appendix hereto.

The case is as follows:

Mrs. Ann W. Smith, of the city of Washington, mother of both the complainant and the defendant, died on the 26th day of March, 1865. (1, 7). Her will, made on the 11th day of February, 1865, contains, among others, the following provision:

> "I hereby give, devise, and bequeath to my daughter Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns, two hundred and eighty (280) shares of stock of the Washington Gas-Light Company . . . to have and to hold the same in and upon the trusts and provisions following—that is to say, in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the *dividends* of said stock . . . as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal, and in case of the death of the said Mary Ann Gibbons, then the said stock and *income* shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste." (Rec., pp. 7–8.)

The Washington Gas-Light Company was incorporated by act of Congress of July 8th, 1848, with a capital stock of $50,000, in shares of the value of $20 each. By acts of Congress of August 2nd, 1852, and January 3rd, 1855, its capital *stock* was increased to $350,000 and $500,000, respectively. (2, 7–8.) The total number of shares at the latter date was, accordingly, 25,000.

On February 10th, 1866, nearly a year after Mrs. Smith's death, a dividend of one (1) dollar per share was declared on the stock of the company, the amount payable by reason of which dividend on the 280 shares bequeathed by Mrs. Smith (but which then still stood on the books of the company in her name)—that is to say, the sum of $280—was, duly paid by the appellee to the appellant. (1–2, 7.) Besides this dividend the company declared others, yet while so doing it did not distribute to its shareholders all its net earnings, but portions of such net earnings were expended and invested by the company, from time to time, in the enlargement and extension of its permanent works and plant. This expenditure and investment of the net earnings not paid out to the shareholders was carried to what the company calls its "construction account," which account included also expenditures for like purposes from the subscribed capital. This account stood on January 1st, 1865, at $842,623.02; on July 1st, 1868, at $988,914.84, and on January 1st, 1869, at $1,039,287.17, of which amounts all over the sum of $500,000 was paid out of the net earnings and profits not distributed as dividends. (2, 8.)

By act of Congress of May 24th, 1866, it is provided respecting the company as follows:

> "That the capital *stock* of said company be, and the same is hereby, increased five hundred thousand dollars." . . . (7.)

On or about November 1st, 1868, the directors of the company adopted this resolution:

> "Whereas the construction account of this company exceeds one million of dollars, and as the *capital* of the company has been increased by an act of Congress to one million of dollars; therefore, be it resolved, that the increased *stock* be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868." (2, 9–10.)

At the time of the adoption of this resolution, *in 1868*, notwithstanding the act of Congress of *1866*, the total number of shares of the company's stock still stood at 25,000; and the 280 shares bequeathed to the appellee had been, viz., on September 29th, 1868, transferred on the company's books to the name of the appellee "*as trustee under and by virtue of the last will and testament of the said Ann W. Smith.*" Upon the adoption of the resolution of November, 1868, the company made and issued certificates for 25,000 new or additional shares of stock, thus bringing the whole number up to 50,000, which, at $20 per share, represented the full capital of $1,000,000. Of the 25,000 new shares, thus representing net earnings and profits, 280 were, by force of the resolution, *awarded* to the appellee as trustee; and she accordingly received, in her name as trustee, a certificate for 560 shares, representing the 280 shares bequeathed by Mrs. Smith and the 280 new shares awarded on account of the former by the resolution. (3, 10–11.)

The appellee now holds and retains the 560 shares, and has paid to the appellant the cash dividends from time to time declared thereon; but the appellant claims to be entitled to the 280 new shares, so called, created as above set forth, which claim the appellee resists. (3–4, 11–12.)

The appellant filed her bill to enforce her claim, to that end asking an interpretation of Mrs. Smith's will and appropriate relief.

II.

Assignment of Errors.

The court below erred:

1. In holding that the appellant is not entitled to the 280 so-called new or additional shares of stock of the Washington Gas-Light Company mentioned in the bill of complaint.
2. In holding that as to the said shares of stock the appellant is entitled only to the cash dividends thereon.
3. In holding that, under her mother's will, the appellant is entitled only to the ordinary and usual cash dividends on the 280 original shares of stock of the Washington Gas-Light Company, so called in the bill of complaint.
4. In dismissing the appellant's bill of complaint and in denying her the relief thereby prayed.

III.

Argument.

A.

By the terms of Mrs. Smith's will, the appellee holds the original 280 shares "for the advantage and behoof" of the appellant, whom the will entitles to receive the dividends of those shares, as such dividends accrue, during her lifetime

1. *What are dividends?*

> Whether the testator makes use of the expression, "dividends," or "dividends and profits," or "dividends, interest, and profits," or "interest, dividends, profits, and proceeds," all of them come to the same thing, and furnish no circumstance to found a distinction upon.
>
> Hooper *vs.* Rossiter, 1 McClel., 527, 536.
>
> "Dividends," as used in the will, is unqualified; it includes, in its technical sense, as well as in its ordinary and common acceptation, all distributions to corporators of the profits of the corporation, whether such distributions are large or small, or whether made at long or short intervals, and without any regard to the manner or place of their declaration or *mode of payment.*
>
> Clarkson *vs.* Clarkson, 18 Barb., 646, p. 657.
>
> See Lord *vs.* Brooks, *post.*

Dividends, accordingly, may take various forms. The ordinary form is the distribution of money to shareholders, but common forms are those known as stock and scrip dividends. If the definition given by the Court in Clarkson *vs.* Clarkson be accepted, as it should be, the question involved is readily answered: By the terms of that definition the appellant is clearly entitled to the 280 new shares; for—

2. *The new shares are in effect and in substance a stock dividend.*

> A corporation, established in a State where it was not lawful for it to make a stock dividend, having $280,000 profits invested in mills and other property, voted to create 3,000 new shares of the same par value, and at the same time declared a dividend of 40 per cent. on the old shares, and authorized the treasurer to receive this dividend in payment for 2,800 new shares and issue certificates of stock for said dividend and sell the 200 shares: *Held,* that by receiving a certificate for certain

of the 2,800 new shares, "the substance of the transaction was, that the shareholder received a stock dividend."

Daland *vs.* Williams, 101 Mass., 571, p. 574.

A corporation, having a large amount of surplus earnings invested in plant, &c., voted to increase the number of shares of its capital stock, so as to allow each stockholder to increase the number of shares held by him one-half, and commanded the directors to do whatever was required by law for that purpose. A vote of the directors, passed the same day, declared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment of those shares, and directed the treasurer to issue such shares to old stockholders only. Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. The checks were then destroyed without being presented at the bank: *Held*, that the stock issued in compliance with the above votes constituted a stock dividend.

Rand *vs.* Hubbell, 115 Mass., 461.

"The whole question in this case depends on the fact whether the increase in the stock of this company was a stock dividend. . . . The stock dividend is a thing well understood, and has been passed upon by this Court in several instances. In Commonwealth *vs.* Cleveland, &c., R. Co., 29 Pa. St., 370, it was said that 'in assessing the tax no difference can be made between the dividends actually paid to the stockholder and stock dividends, which are the profits added to the stock of each corporation.' . . . In Lehigh Crane Iron Co. *vs.* Comm., 55 Pa. St., 448, . . . we held that the increase having resulted from earnings . . . was a dividend made, though not so declared."

Comm. *vs.* Pittsburgh, &c., Co., 74 Pa. St., 83.

Net earnings of a corporation may be expended or invested in construction or equipment, or in the purchase of real estate or other properties, but the investment, whatever it may be, belongs to the stockholders, and may be distributed, as they may direct, in dividends of stock, or of scrip, or of money. Accordingly, where a railroad company, limited by its charter to ten per cent. dividends, had expended in construction, equipment, &c., an amount equal to eighty per cent. of its capital, and certificates in effect representing this expenditure were issued to the stockholders in proportion to the stock held by them, the transaction constituted a dividend in scrip.

Bailey *vs.* Railroad Co., 22 Wal., 604, pp. 635–'6.

3. *And the tenant for life of stock is entitled to all dividends declared thereon during his life, irrespective of the time when they were earned, provided only that they do not impair the capital of the trust fund.*

A testator died February 12th, 1860, his will bearing date January 23rd of that year. In February, 1861, and at a subsequent date, two sums were paid the executors as dividends on shares of stock left by the testator in trust for certain ones for life, with remainder over. Such dividends were declared and made and paid after the death of the testator in respect of profits made by the company prior to the 30th day of November, 1859. Sir John Romilly, M. R., held:

"No person is entitled to any portion of the profits made by a public company until a dividend has been declared. . . . Here, no doubt, the profits had been earned at an earlier period, but that does not entitle the shareholder to a definite share of the profits. . . . The analogy of the decision of Clive *vs.* Clive (Kay, 600), of a specific legacy of bank stock, where the testator died a few days before the time of payment of a dividend, is perfect. The profits had been made before, but no part of them had been appropriated or belonged to the testator's estate.

"It is therefore impossible to doubt but that the dividends declared after the testator's death are a portion of the income of the legatees for life."

Bates *vs.* Mackinley, 31 Beav., 280.

"We think the true rule to be that when a dividend upon its stock is declared by a corporation it belongs to the person holding the stock at the time of the declaration, whether the holder be a life tenant or remainderman, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company."
Richardson *vs.* Richardson, 75 Me., 570.
See Goodwin *vs.* Hardy, 57 Me., 143.
Jermain *vs.* Lake Shore Co., 91 N. Y., 483.

And it is immaterial whether the dividend be in stock or in money; any distinction on that score being, in the language of Lord Eldon, "too thin."
Paris *vs.* Paris, 10 Ves., 185.

B.

But the question, though seemingly simple, has been much considered by courts, and an examination of the reported cases will reveal much difference upon the subject.

1. *The English adjudications.*

The Bank of England subscribed a large sum for the public service, and received therefor "five per cent. annuities." These, by resolution, the bank divided among the proprietors of its stock *pro rata.* In a contention between one entitled to a life interest in stock of the bank before the subscription and the remainderman, it was held, in 1799, that the annuities were an accretion to the capital, and, therefore, that the person entitled for life could have the benefit of them by way of dividend only.
Brander *vs.* Brander, 4 Ves., 800.

The House of Lords, in 1803, followed the decision of Brander *vs.* Brander, by overruling the court of session of Scotland, which had held a tenant for life entitled to an extraordinary dividend or *bonus.* The lords were urged to their decision by Lord Chancellor Eldon in this wise: "The question for the determination of your lordships therefore is whether you will *affirm* the judgment in the present appeal and thereby reverse all that has been done in this country, or reverse that judgment and thereby confirm these decisions. . . . It is impossible to deny that great difficulties attend this matter. The proper question is on which side the fewest difficulties lie; and, added to this, in a case of *res non integra*, I think your lordships would scarcely reverse the very numerous decisions pronounced in this country [on the authority of Brander *vs.* Brander, but not reported because not appealed from] except upon strong grounds. . . . Though I am aware that there is a difficulty in the principle of the English decisions, it is impossible not to say that the decisions in both countries ought to be the same."

Irving *vs.* Houston, 4 Sco. App. Cas. (Paton), 521.

The Bank of England's habit since its incorporation had been to make half-yearly dividends, and for some time the rate had been 3½ per cent. In September, 1804, the usual 3½ per cent. dividend was made, and in the same month a gross sum, amounting to 5 per cent. of the capital, was "divided among the present proprietors of bank stock according to their respective interests." Lord Eldon, in 1804, following, but disapproving the former decisions, and saying that he had great difficulty in stating the principle which led to them, held that the extraordinary division must be considered as capital and therefore not the absolute property of the tenant for life.

Paris *vs.* Paris, 10 Ves., 185.

In this case the argument of Romilly, for the tenant for life, is scarcely touched upon by the Chancellor. Paris *vs.* Paris is followed in Clayton *vs.* Gresham, 10 Ves., 288.

A bequest was made to trustees, who should "from time to time, as the same shall become due, receive all the dividends and profits of all my share of the capital stock of the Bank of England, and pay the same and every part thereof" to the testator's daughter. The regular dividends at the testator's death were 3*l* 10*s*. half yearly. In September, 1805, an extraordinary dividend of 5*l* was ordered, in addition to the regular half-yearly dividend, both sums to be included in one warrant; whereupon, pursuant to the order, "a dividend of 8*l* 10*s*. per cent. interest and profits for the half year" was made.

Lord Erskine held, in 1807, that the extra dividend of 5*l* went to the capital, not to the tenant for life. But he said: "It is not for me to say how this would be if it were *res nova;*" and he sought refuge behind the language of the bequest, "dividends and profits 'from time to time as they become due.' This expression is not immaterial. These profits cannot be said to become due. They are in the discretion of the bank. The profit that becomes due, in the ordinary interpretation of that word, is the ordinary fruit of the stock." And Sir Arthur Piggott and Mr. Phillimore in argument said: "It is not disputed now that the decisions that have taken place upon this point are not supported by law."

Witts *vs.* Steere, 13 Ves., 363.

After the death of a testator an investment was made, by his direction, in Bank of England stock. The half-yearly dividends to October, 1781, were 2¾ per cent.; then 3 per cent., to April, 1788; then 3½ per cent., to April, 1807; then 5 per cent. Lord Eldon, in 1807, held that the life tenant was entitled to the full 5 per cent., the increase in the rate not appearing to have been caused otherwise than by natural increase of profits. This case contains reviews of the former cases by both counsel and court.

Barclay *vs.* Wainewright, 14 Ves., 66.

The last case was followed in 1847, in Price *vs.* Anderson, 15 Sim., 473.

In 1850 Knight Bruce, V. C., held a *bonus* or increased of 10*l* per share to be income, to go to the tenant for life.

Johnson *vs.* Johnson, 15 Jur., 714.

In 1853 Wood, V. C., held the life tenant to be entitled to all dividends accrued due since the testator's death, and also to every *bonus*, if paid out of profits.

Murray *vs.* Glasse, 17 Jur., 816.

> And in 1856 the House of Lords, following the later decisions, said of the rule laid down in Brander *vs.* Brander: "Lord Loughborough laid down the rule, though evidently feeling that it rested on not very solid ground."
>
> Cuming *vs.* Boswell, 2 Jur. (N. S.), 1005.

Thus far the cases cited have all dealt only with *bonuses* or dividends extraordinary in amount; but we also meet with cases of another sort.

A bequest was in the following form:

> "I give and bequeath the sum of 11,000*l* capital bank stock, now standing in my name in the books of the Governor and Company of the Bank of England," unto A. B., the dividends, interest, and proceeds thereof, to and for his own proper use and benefit for and during the term of his natural life; and, subject thereto, A. B to assign and transfer the stock to his own children. The will was dated May, 1815. The testator died September 29, 1816.
>
> By act of 56 George III, in consideration of an advance for the public service, the bank's capital was increased by Parliament, the amount of increase to be appropriated among those persons and bodies politic and corporate who were proprietors of stock on May 23, 1816, at the rate of 25*l* for every 100*l* of stock which "such persons, bodies politic and corporate, were then respectively proprietors of or had standing in their respective names" in the books. The act further provided that "all such persons, bodies politic and corporate, shall, from the time of such division and appropriation, be lawfully entitled to the additional sum of bank stock so placed in or to the credit of their respective names, and shall respectively be entitled to be paid the same rate of dividends thereon and to possess and enjoy the same profits, privileges, and advantages in respect thereof in like manner, to all intents and purposes, as they were entitled to be paid, possess, and enjoy in respect of the bank stock which stood in their respective names on the said 23d day of May, 1816."
>
> The question considered by the court in respect to this stock was whether the additional 2,750*l* given by

the bank on account of the 11,000*l* passed to the life tenant, and the vice-chancellor, Plumer, in 1817, held not. He puts his conclusion upon the language of the bequest: "It has all the appearance of a specific legacy; it is a gift of '*the* sum of 11,000*l* capital bank stock, *now standing in my name.*' . . . He does not bequeath *the whole* of his bank stock, but only the stock 'now standing in my name. . . . Before the act passed it was illegal in the bank to create an additional capital; they were prohibited from increasing their capital. Though the testator had foreseen that some advantages would accrue in respect of his capital, yet he could not foresee that it would arise in the shape of additional capital. . . . The specific legacy is 11,000*l* bank stock, and it cannot be said that 13,750*l* bank stock passes under a legacy of 11,000*l* bank stock." The italics are the vice-chancellor's.

Norris *vs.* Harrison, 2 Madd., 268.

Hooper *vs.* Rossiter, 13 Price, 774; 1 McClel., 536, decided in 1824 and involving the same question, follows Norris *vs.* Harrison.

Ezekiel Barton, in 1850, settled upon trustees five shares of the India General Navigation Company in trust to pay his granddaughter during her life the "interest, dividends, share of profits or annual proceeds of the said shares," &c., the shares on her death to go to others.

The capital stock of the company consisted at first of 1,073 shares, of which Barton's five were part. By June, 1858, by circumstances similar to those hereafter stated, the total number of shares had been increased to 1,300, one new share being added to the five. In 1859, to represent earnings invested by the company in steamers and flats, 260 additional shares were issued, bringing the number up to 1,560. Of these additional shares one and one-fifth were allotted to the trustees under Barton's settlement. Subsequently still another addition was similarly made, by all which means three and six-tenths new shares had been added to the original five. The question was whether these new shares were income, belonging to the tenant for life, or capital, to go to those in remainder.

> Vice-Chancellor Wood, in 1867, held "that the additional shares were made capital. . . . The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare, and when the company meet and say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account and turn it into capital it is competent for them, I apprehend, to do so; and when that is done everybody is bound by it, and the tenant for life of those shares cannot complain. . . . Where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle."
>
> *In re* Barton's Trust, 5 Eq., 238.

In the light of the earlier English adjudications, the law on the subject is thus stated in Hill on Trustees, 386:

> "It is settled that any extraordinary *bonus* or addition to the usual annual income of stock or other property, which is settled in trust for one for life with remainder over, must be treated as capital and added to the principal fund. The trustees, therefore, will not be justified in paying over these unusual additions to the beneficial tenant for life, but they must invest them for the benefit of all parties."

But this statement is qualified in note 1 to the 4th American edition, and is disowned in Clarkson *vs.* Clarkson, 18 Barb., 646, hereafter cited, as well as in the later English cases, above cited.

2. *The rule established in Massachusetts.*

> If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustee as a lawful dividend thereon accrue as capital, although they rep-

resent the net earnings of the corporation. "A trustee needs some plain principle to guide him; and the *cestuis que trustent* ought not to be subjected to the expense of going behind the action of the directors and investigating the concerns of the corporation, especially if it is out of our jurisdiction. A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital. The court [A. D., 1868] are of opinion that this rule is more in conformity with the legal and equitable rights of shareholders than any other that has been suggested."

Minot *vs.* Paine, 99 Mass., 101.

This case has since been followed in Massachusetts. In 1869, it was followed in Daland *vs.* Williams, 101 Mass., 571, In the same year, in Leland *vs.* Hayden, 102 Mass., 542, the court said: "We must regard the principle as settled that stock dividends are to be regarded as principal and cash dividends as income;" and, in 1872, in Rand *vs.* Hubbell, 115 Mass., 461, it was held: "By the law of this Commonwealth, as declared by this court, a dividend made in new stock is ordinarily to be deemed capital."

3. *The New York cases.*

In 1855, James, J., delivering the opinion of the court, after doubting the statement in Hill on Trustees, 386, above quoted, and citing the English cases, said:

"I am not satisfied with these decisions, and there is no sound principle upon which they can be upheld.

"I am satisfied that these decisions will never be followed in this country, and will be repudiated, if they are not already, in England. . . . The stock payment of 60 per cent. made upon this investment was properly dividends, extraordinary in amounts, not in manner of payment, that being a matter of policy with the company. 'Dividends,' as used in the will, is unqualified. It includes, in its technical sense as well as in its ordinary and common acceptation, all distributions to corporators of the profits of the corporation, whether such distributions are large or small, or whether made at long or short intervals, and without any regard to the manner or place of their declaration or mode of payment. . . . The 60 per cent. stock dividend, made December 30th, 1850, belonged to the tenants for life, and the trustees must be decreed to deliver over to them the said stock or its substitute and all income, dividend, or increase received thereon, or pay the value thereof."

Clarkson *vs.* Clarkson, 18 Barb., 646.

A testator directed an investment, the income of which should be paid to his wife during her life. A portion of the fund was invested in stock of a national bank. The bank's charter expired, and it was reorganized. Preparatory to the reorganization the bank declared a dividend, over and above the par value of the stock, of 18 per cent., leaving it to the option of the stockholders to take stock in the new bank, adding the dividend, or to take the same in money. The trustee took the dividend in the new stock, receiving a certificate accordingly.

Held, in 1859, that the testator intended all the income of the investment to be paid his wife, but that the capital so invested should be preserved.

Held, also (under Clarkson *vs.* Clarkson), that the payment of 18 per cent. by the bank must be considered a dividend; but as it contained part of what must be regarded as capital when the stock was purchased [*i. e.*, the difference between the par value and the market value, the purchase being after the testator's death], so much thereof as was necessary to make up the original investment over and above the par value of the stock taken by the trustee in exchange should be retained by him, and that the residue belonged to the wife.

Simpson *vs.* Moore, 30 Barb., 638.

In a case similar to the last the company's stock was doubled and an extraordinary dividend declared, applicable at the shareholders' option in payment of new stock. The trustee took new stock. Tucker, Surr., in 1865, reviewing the authorities and stating the question, said: "The question is by no means a novel one. It has gone through the court of chancery in England, and thence up to the House of Lords; had been considered ten or fifteen years ago as settled in favor of the remaindermen, but has been at last finally and definitely determined in the contrary direction in England and, I may safely assume, in this country. The conclusion which has thus been arrived at is surely warranted alike by good sense and sound principles of legal construction, and would so commend itself to me were the question a perfectly new and open one at this day."

In re Woodruff's Est., Tuck., 58.

The authorities are again reviewed, including the last, by Calvin, Surr., in 1877, the principle laid down in the New York cases being adopted; and, among other things, the principle observed that increase in market value is increase in capital, in—

The Matter of Pollock, 3 Redf., 100.
And see Whitney *vs.* Phœnix, 4 do., 180.

4. *The rule in Pennsylvania.*

A testator bequeathed in trust, among other things, stock in a manufacturing company, the income and interest of which were to go to his children. Upon this stock large surplus profits had accumulated and continued to accumulate for several years after his death, when, with the consent of the executors and legatees, the capital stock of the company was increased, the new stock being distributed among the stockholders *pro rata.* The old certificates issued to the testator were surrendered and cancelled, and new certificates for the whole amount of stock, including the increase, were issued to the executors, the surplus earnings or profits being applied to the payment of the increased shares of stock. *Held,* in 1857:

(*a.*) The surplus accumulated at the testator's death was part of the principal, so much so that it would pass by sale of the stock. The accumulations of surplus since his death were as much part of the income as were the current dividends, and as such the latter belonged to the legatees for life.

(*b.*) Though the accumulations since the testator's death might be withheld for a time, upon reasons beneficial to the interests of the parties entitled, their rights thereto could not be affected by any mode adopted for their distribution or the evidences given to secure them.

(*c.*) The value of the stock held by the testator at the time of his death constitutes the principal of the fund and remains subject to the trusts in the will; and this holds good, whether the stock remains as at the testator's death or is merged into a new issue, in which latter case the principal is so much of the new stock as is equivalent in value to the old; the remainder, although in the form of certificates of stock, is to be regarded as income since the testator's death and distributed accordingly.

Earp's Appeal, 28 Pa. St., 368.

A testatrix bequathed her estate in trust to pay her daughter a sum certain annually from the income and the remainder of the income to her son. Part of the trust fund was stock in two corporations. One ordered an increase of stock to be distributed to the old stockholders on payment of a certain sum per share; the trustee sold the privilege to subscribe. The other corporation made a similar order; the trustee advanced money, subscribed for the new stock, sold it at an advance, and carried what was received in both cases to the trust account. *Held,* in 1870, that both items were income, not capital; for "the price brought by the sale of the subscription right and the premium of the subscribed stock are an incidental, and in one sense an accidental, profit, following the ownership of the old stock, as the product of an advantage belonging to it;" and "the principle established in [*Earp's*] case is that the earnings or profits of stock made after death are income and not capital, even though in *form* of capital by the issue of new stock. *Equity, seeking the substance of things, found that the new stock was but a product and was therefore income. Precisely so it is here, equity discovers the subject of controversy is a mere product, a right incidental to the stock, and is therefore income.*"

Wiltbank's Appeal, 64 Pa. St., 256.

In 1877 the court applied the principle of the last two cases, but under the special circumstances of the

6. *The decisions in New Hampshire.*

A testator gave to his son the income of two shares in a corporation during his life, the shares on his decease to go to the testator's heirs. $500 had been paid in on each share constituting the original estate, but, by increase in the value of the property of the corporation, the shares were, at the time of the making of the will, of the value of about $1,500 each, and it appeared that the testator so valued them in making the bequest. The corporation having made regular dividends of income up to a certain date, after the decease of the testator, at that time voted to sell its property and divide the proceeds, which was done. *Held*, in 1846, that the dividends received by the executor after this vote were to be regarded as dividends of the capital, substituted for the shares, and that the son was entitled to the income which should be derived from the sums so received, the principal, on his decease, belonging to the heirs.

Wheeler *vs.* Perry, 18 N. H., 307.

The owner by deed conveyed forty shares of bank stock to a trustee, in trust to "pay the dividends of the said stock, as the same may from time to time be made and declared," to the grantor, and on her death to "transfer and convey the same" to others. The bank's charter expired in 1845, from which time until 1849 various cash dividends of surplus were made. These dividends, together with $4,000 received as the par value of the forty shares, were invested by the trustee in the purchase of fifty-three shares of the stock of a second bank. This second bank ceased to do business in 1864, from which time until 1868 it also made various cash dividends of surplus. These last, with the par value of the fifty-three shares, were received by the trustees, who thereupon invested the par value of the forty shares of the first bank ($4,000) in the purchase of forty shares of the stock of a third bank, paid $1,000 to the grantor in the trust deed, and had left in his hands a balance of $3,036.15. The grantor died in 1869. The value of the forty shares of the first bank, at the date of the trust deed, was less than that of the forty shares of the third bank at the time of the grantor's death. *Held*, in 1872, that the grantor's administrator could recover the $3,036.15 in the trustee's hands as income to which the grantor was entitled under the trust deed.

SMITH, J.: "We cannot agree with the plaintiff's [remainderman] counsel that the deed is to be construed as though it read, 'Mrs. Brooks is to receive only what the directors may semi-annually divide as income.' The word 'dividend' and the word 'income,' as used in this trust deed, both obviously mean the same thing. It was clearly the intention that the tenant for life should, at the least, receive all the net earnings there, after accruing from the 40 shares which should be distributed to the shareholders during her life. . . . If it be conceded, for the purposes of this case, that the net earning of the bank remain the property of the bank as fully as its other property till the directors declare a dividend, and that the tenant for life has no title to them prior to the dividend, still their nature remains the same all the time, and when they are divided the tenant for life is just as much entitled to them as though they had been divided the moment they were earned. Their *source* is not changed by the delay in distribution. It may often be expedient for the directors to retain a portion of the net earnings as a reserve fund to meet contingencies. This reserve fund may often be spoken of as 'capital,' irrespective of the source whence it is derived. But when the necessity for the reservation ceases and the reserve fund is divided among the shareholders, the question whether it is income or capital depends on its *origin*. . . . The view we have taken seems to be sustained by decisions in Pennsylvania, New York, and New Jersey [citing]. The earlier English cases do not appear to be now regarded as law in that country. . . . The reasoning in Minot *vs.* Paine is unsatisfactory to us.

LADD, J., on a rehearing:

"The naked proposition is this; when it appears, as it does in this case, that the directors or the banks reserved—that is, omitted to divide—a portion of the income, the court are to say, as matter of law, that the portion thus reserved thereupon, immediately and by force of the reservation, is changed into shares. . . . [Admitting certain positions taken for the remainderman] the case, then, stands thus: During all the time this reserved surplus was in the hands of the banks it was part and parcel of the forty shares which had earned it; so welded to those shares, if we may use the expression, that the two had become one piece. What follows? We have already seen that extra dividends in cash, made from accumulated earnings or income—that is, from earnings which have not been divided—in other words, from earnings which have been reserved—upon the authority of all the cases for the last sixty-five years, leave the hands of the corporation not shares or aliquot parts of shares, but income, and go, not to the fund, but to the *cestui que* trust. Now, admitting what has already been admitted, that the act of reserving or retaining converts income into shares, it follows that dividing and paying it changes it back to income again; so that after two transmutations it comes out of the crucible the same thing it went in, namely, income. . . It makes no difference how or when this surplus was finally distributed. If it was income in the beginning and either the banks had not the legal power to change its essential character so as to make it stock, or, having such power, did not exercise it, it would be income still and all the time; and no matter in what form it was paid, or when, if during the continuance of the trust, it would confessedly go to the tenant for life."

Lord *vs.* Brooks, 52 N. H., 72.

The last case was followed by the court in 1878.

"A part of the estate was stock of various railroads. During the life estate the railroads issued new stock, giving stockholders the right to buy the new shares at par. The new shares being worth more than par, the right to take them was valuable property. Was this property given by the will to the remainderman or to the tenant for life? Was it capital or income? *A railway corporation cannot alter the wills of the stockholders by calling a dividend stock or calling it earnings. Whether the dividend is the capital of a remainderman or the income of a life tenant is a question which a mere bequest of a life estate* *and remainder does not submit to the decision of the railroad."*

Pierce *vs.* Burroughs, 58 N. H., 302.

In no other of the United States has the question been considered, except, in 1881, in Georgia, where it is governed by the code of that State.

See Millen *vs.* Guerrard, 67 Ga., 284.

"From the character of the decisions in the various States," says Mr. Perry (on Trusts, vol. 2, sec. 545, note 1, pp. 84–90), "and from the great number of States in which no decision has yet been made, it may be considered an open question, at least in a great majority of the States;" and he proceeds to state the result, in point of principle, of the different adjudications:

(*a.*) *The principle of the English and Massachusetts cases.*

> "There is no doubt of the doctrine in England. . . 'Wherever the addition was made clearly and distinctly as dividend only the tenant for life was to have it; but wherever it was not clearly given as a dividend it was considered as an accretion of capital divisible among the proprietors.' Hooper *vs.* Rossiter. . . . 'The dividend to which the tenant [for life] is entitled is the dividend which the company chooses to declare; and when the company meet and say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it.' *In re* Barton's Trust. . . The meaning of this is that where a corporation votes 'not to divide' its earnings, but to turn it [them] into capital, it [they] becomes [become] capital to the corporation, and that what is capital to the corporation must be capital to the shareholders; and although the corporation may vote that such increased capital shall be apportioned or divided among its shareholders *pro rata* it is not a 'dividend' of 'profits' or 'interest' or 'income' or 'proceeds' or 'produce' within the meaning of a testator in his will or within

force of the reservation, is changed into shares. . . . [Admitting certain positions taken for the remainderman] the case, then, stands thus: During all the time this reserved surplus was in the hands of the banks it was part and parcel of the forty shares which had earned it; so welded to those shares, if we may use the expression, that the two had become one piece. What follows? We have already seen that extra dividends in cash, made from accumulated earnings or income—that is, from earnings which have not been divided—in other words, from earnings which have been reserved—upon the authority of all the cases for the last sixty-five years, leave the hands of the corporation not shares or aliquot parts of shares, but income, and go, not to the fund, but to the *cestui que* trust. Now, admitting what has already been admitted, that the act of reserving or retaining converts income into shares, it follows that dividing and paying it changes it back to income again; so that after two transmutations it comes out of the crucible the same thing it went in, namely, income. . . It makes no difference how or when this surplus was finally distributed. If it was income in the beginning and either the banks had not the legal power to change its essential character so as to make it stock, or, having such power, did not exercise it, it would be income still and all the time; and no matter in what form it was paid, or when, if during the continuance of the trust, it would confessedly go to the tenant for life."

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> "There is no doubt of the doctrine in England. . . 'Wherever the addition was made clearly and distinctly as dividend only the tenant for life was to have it; but wherever it was not clearly given as a dividend it was considered as an accretion of capital divisible among the proprietors.' Hooper *vs.* Rossiter. . . . 'The dividend to which the tenant [for life] is entitled is the dividend which the company chooses to declare; and when the company meet and say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it.' *In re* Barton's Trust. . . The meaning of this is that where a corporation votes 'not to divide' its earnings, but to turn it [them] into capital, it [they] becomes [become] capital to the corporation, and that what is capital to the corporation must be capital to the shareholders; and although the corporation may vote that such increased capital shall be apportioned or divided among its shareholders *pro rata* it is not a 'dividend' of 'profits' or 'interest' or 'income' or 'proceeds' or 'produce' within the meaning of a testator in his will or within

the meaning of the law. . . . The supreme court of Massachusetts, in Minot *vs.* Paine, 99 Mass., 101, probably intended to establish this general doctrine, but the opinion went somewhat further and laid down a rule which is not properly guarded, and, as a rule, it has been modified or abandoned in the later decisions. . . . The great argument in Massachusetts, which does not seem yet to have been considered by the court, is this: Corporations are forbidden to make dividends except from profits; if, therefore, a corporation declares a dividend, whether payable in stock or in money, such dividend must accrue from profits upon the capital invested, and, it being profit upon the capital stock invested, it must belong to the tenant for life."

b. The principle of the State cases outside of Massachusetts.

"Earp's Appeal, 28 Pa. St, 368, is a leading case against the authority of the English and Massachusetts cases. . . . In regard to this case it may be said that it goes too far. It cannot be sustained in all its broad assertions, whether they are necessary for the decision of the case or not. For instance, it has never been supposed that a stockholder in a corporation had any ownership in the earnings of a corporation before the corporation itself had set apart a sum as earnings and declared and divided it as a dividend. . . . If, therefore, a corporation, acting in good faith, uses its earnings in improving its property and neglects to apportion or divide them, how can a tenant for life enforce his ownership? Can a court of equity compel a corporation, acting in good faith, to declare a dividend? . . . The authority of a corporation to apply any part of its earnings to the permanent improvement of its property, and thus to deprive the tenant for life of his share of the income or earnings of the corporation, is denied in this case, at least so far as the rights of a tenant for life are concerned. In short, the proposition or assertion of this case that the earnings are the rightful property of the tenant for life, and that no action of the corporation can alter his rights to them cannot be sustained in practice for the simple reason that nothing belongs to the stockholder until a dividend is made, and

> until a dividend is made the tenant for life has no rights to ownership to be altered or affected by the action of the corporation. . . . If, therefore, the corporation has a right to turn any part of its 'income' into capital as against the absolute owner, who has not only the life interest but the whole interest in himself, it must have the same right as against the trustee, who, so far as the corporation is concerned, is the absolute owner of the stocks. The corporation, then, would seem to have the right, acting in good faith, to apply its income as capital to its business, especially if the corporation itself or its directors, acting within the scope of their authority, vote to do so. If the corporation votes to do so and thus increases the value of the shares in the hands of the trustees but creates no new shares, can the tenant for life call for this increased value? . . . The case in Pennsylvania seems so to decide."

This author gives the English and Massachusetts principles its most presentable appearance; but, at the same time, he deals that principle a death blow. The "great argument" to his mind has been overlooked in Massachusetts, and that argument rests wholly upon the position assumed for the appellant in this case: any dividends accruing from profits upon the capital invested, whether such dividend be payable in money or in stock, *being profit*, must belong to the tenant for life.

In regard to his statement of the other principle, it may be said, with all respect to the great abilities of the learned author, that he misinterprets the views of the supreme court of Pennsylvania; and he neglects to examine the principle as it is stated and applied in the other jurisdictions where it has been adopted. In Earp's Appeal the court neither said nor intended to say that a tenant for life could "call for" any increased value of shares in the hands of his trustees: what the court said was that whenever this increased value "leaves the corporation," as the phrase is, a court of equity will *then* examine it, and, resolving it into its constituent elements, dispose of it accordingly. And this is the rule, as practically applied, wherever Earp's Appeal has been approved. It is threshing very old straw to argue that a stockholder must wait for his dividends, and that a court of equity cannot be called upon to relieve his impatience; but it is scarcely a happy statement of the law to say that, until a dividend is made, a stockholder "has *no rights or ownership* to be altered or affected by the action of the corporation." The opinion of Smith, J., in Lord *vs.* Brooks, reads almost as though Mr. Perry's treatment of this subject were under review by the court, so directly does that opinion deal with and destroy his not over-lucid nor altogether consistent views put forth by way of objection to the Pennsylvania rule.

An examination of the authorities above cited shows on how unsound a basis the rule in England and Massachusetts rests. The intention of the corporation making the dividend seems to be given paramount consideration in those jurisdictions.

In the House of Lords, when Irving *vs.* Houston was under consideration, the Earl of Rosslyn, who decided Brander *vs.* Brander, said: "When I first came to consider the case of Brander *vs.* Brander I thought it would be necessary to learn what part of the *bonus* had accumulated before the testator's death and what part since that period, to do justice between the claimants. *The bank were very much alarmed when I hinted any intention of this kind.*" In that case, Irving *vs.* Houston, the court of session had at first acted in accordance with his lordship's first thought, which is the principle now established in Pennsylvania, and which Lord Eldon said was better founded, in point of principle, than their ultimate conclusion, giving the whole *bonus* to the tenant for life; and the Lord President Campbell, in delivering the opinion of the court of session, said: "According to the argument maintained by the trustees [the bank] might starve [the life tenant] by dividing nothing at all or by merely dividing a trifle."

In Paris *vs* Paris Lord Eldon said: "It is true the bank have it in their power to give the *bonus* to the tenant for life or not." In Witts *vs.* Steer Lord Erskine held himself bound by "the principle, which seems to have governed the House of Lords in the case of Irving *vs.* Houston, that, whatever conduct or language the bank may hold, if they do not increase the dividend, but take this mode of distributing the profit, it is a part of the capital." In Price *vs.* Anderson it was said by Shadwell, V. C.: "The question must be determined by the mode in which the company have dealt with their profits." In Barton's Trust, Wood, V. C., rested his conclusion distinctly and solely upon the ground that "where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time."

In Minot *vs.* Paine the court said: "This discretionary power of a company over its earnings is certainly a very essential element in its bearing upon the respective rights of tenants for life and remainderman." In Leland *vs.* Hayden it was said: "The question whether dividends are to be deemed of principal or of income is to be determined by the votes of the corporation." And although in Heard *vs.* Eldredge (109 Mass., 258) it was said, "The suggestion that the intention of the directors should determine the question whether the dividend is income or capital cannot be correct," yet in Rand *vs.* Hubbell it was again held that the question "depends upon the substance and intent of the action of the corporation as shown by its votes."

This "intention of the corporation" and the simplicity claimed for the rule of Minot *vs.* Paine are the supports, and the only supports, of the English and Massachusetts rule. The New Hampshire court emphatically and, as I submit, most properly denies to corporations the right to make or elements, dispose of it accordingly. And this is the rule, as practically applied, wherever Earp's Appeal has been approved. It is threshing very old straw to argue that a stockholder must wait for his dividends, and that a court of equity cannot be called upon to relieve his impatience; but it is scarcely a happy statement of the law to say that, until a dividend is made, a stockholder " has *no rights or ownership* to be altered or affected by the action of the corporation." The opinion of Smith, J., in Lord *vs.* Brooks, reads almost as though Mr. Perry's treatment of this subject were under review by the court, so directly does that opinion deal with and destroy his not over-lucid nor altogether consistent views put forth by way of objection to the Pennsylvania rule.

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This "intention of the corporation" and the simplicity claimed for the rule of Minot *vs.* Paine are the supports, and the only supports, of the English and Massachusetts rule. The New Hampshire court emphatically and, as I submit, most properly denies to corporations the right to make or change the wills of their stockholders, and the Pennsylvania court does not scruple at characterizing the "simple rule" of Massachusetts as "bungling." If simplicity of the rule to guide trustees be alone sufficient to support a principle, what simpler rule can there be than to give the life tenant all dividends, whether in cash or in stock?

In truth, the rule which obtains in Massachusetts is due to a most confused conception and use of the word "capital," as though it were interchangeable with "principal of the trust fund." The two things have nothing in common. Shares of stock, which are the principal of the trust fund and capital to its owner, so far from being capital to the corporation, are in fact among its liabilities. Why, then, say that what is capital to the corporation must be capital with respect to the trust fund?

The English cases at first proceeded upon the idea that the testator's intention was that the life beneficiary should receive dividends at the rate obtaining when the testator died; though we are free to doubt that had the dividends decreased the principal would have been encroached upon to keep up the income to the life beneficiary; and the rule thus established, though confessedly erroneous, was, for a long time, persistently adhered to on no higher ground than a desire for uniformity. The Pennsylvania rule, on the other hand, takes the intention of the testator to be that the remainderman at the death of the life beneficiary shall have only the value of the principal at the testator's death. The English courts have since acknowledged the error of their position and abandoned it, while the reasoning in Earp's Appeal and Lord *vs.* Brooks in support of the Pennsylvania rule is most forcible, to say nothing of its able support in Simpson *vs.* Moore, and Vandoren *vs.* Olden.

But, reverting to the principles conceded to lie at the foundation of all corporations, neither rule is accurate; although that laid down in Pennsylvania is much the better of the two in point of principle. The true rule is that laid down in Bates *vs.* Mackinley: No matter when a dividend was earned or how long the profits to be distributed have been accumulating, the person entitled to the dividends at the time of declaration should have all dividends from profits or earnings without regard to their form. This is a "simple rule for the guidance of trustees;" it avoids all difficulties as to accounting; preserves the integrity of corporate action; makes no disturbance of corporate management; and, recognizing all individual interests, assures the harmonious continuance of corporate existence and the unembarrassed exercise of corporate functions: results attainable on no other principle, and to which all other considerations should, within due limits, be subordinated so long as corporations hold their place as accredited instruments of industrial and commercial enterprise not inconsistent with individual interest. The clear reasoning in Lord *vs.* Brooks logically leads to this position and in its thoroughness refutes all arguments to the contrary.

HENRY E. DAVIS,
For the Appellant.

[NOTE.—Since the foregoing was written my attention has been called to an article in 19 American Law Review (N. S.), 737, and a note in 21 American Law Register, 381 (to Millen *vs.* Guerrard), where the subject is treated at length, and to which I beg to refer for further consideration of the authorities.—H. E. D.]

APPENDIX.

Mr. Justice James delivered the opinion of the court.

This was a bill filed to obtain the construction of a will. The case was heard on bill and answer. It appears that the late Ann W. Smith, of this District, left by her will, among other things, two hundred and eighty shares of the stock of the Washington Gas-Light Company to Jane Owen Mahon, in trust for the complainant. The paragraph of the will referred to is as follows:

"I hereby give, devise, and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the city of Washington aforesaid, and to her heirs and assigns two hundred and eighty shares of stock of the Washington Gas-Light Company [and some other things], in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons, and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal; and in case of the death of the said Mary Ann Gibbons, then the said stock, bonds, and income shall revert to the estate of my daughter, Jane Owen Mahon, without encumbrance or impeachment of waste."

The answer shows that the accumulated profits of the gas company were from to time expended in extending the plants of their works, and that in the meantime dividends were declared and paid, and that the latter were regularly paid over to the *cestui que trust.* by the defendant.

After the plant had accumulated so that it was double its original value Congress, by act of May 24, 1866, increased the capital stock of the gas-light company to one million dollars, for which the company was authorized, of course, to issue stock. Two hundred and eighty shares were issued to this trustee, and upon the whole, the original and the new two hundred and eighty shares, she continued for some years to pay the dividends to the *cestui que trust.*, but now the *cestui que trust.* claims that these two hundred and eighty shares should be transferred to her, on the ground that, as they represent profits earned and declared by the company, they really belonged to her under the terms of the will.

As a proposition of law, a corporation has a right, within reasonable grounds and in good faith, to reserve and apply its profits to the increase of the plant, and the stockholders hold their stock subject to this right. The company is the legal owner of the whole plant and of the capital, in trust, of course, for the stockholders; but the stockholder is entitled to the profits only when the company, acting in good faith and reasonably, shall divide them, but not until then.

These earnings, then, went into the plant and were not divided. The company lawfully reserved them. When, under this act of Congress, it came to issue new stock, the stock was in no sense a dividend. Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but they parted with nothing in issuing this new stock. They simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends, for which this trustee had to account to the *cestui que trust.* She stood after the issue of the shares just as she had stood before, and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust.*

It is hardly worth while to dwell upon any other proposition. We are of opinion that these new shares were simply representative of the interest that the trustee already had in the *corpus.* They were not in any sense a dividend. They came into her hands in trust, just as the old shares came into her hands, and, as we have said, are in fact but an additional representative of a *corpus* which before this issue was represented by the original shares of stock. The life legatee is entitled to receive, therefore, only the dividends declared on all of these five hundred and sixty shares. The *corpus* itself is held by the trustee for the benefit of the remainderman.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 142.

MARY ANN GIBBONS, Appellant,
vs.
JANE OWEN MAHON, Appellee.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR THE APPELLEE.

J. HUBLEY ASHTON,
Of Counsel.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1888.

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BRIEF FOR THE APPELLEE.

Statement.

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On October 8th, 1885, the complainant set the case down for hearing, in the Equity Court, on the bill and answer, and the cause was ordered to be heard in the General Term in the first instance. (Record, page 14.)

On June 29th, 1885, the Supreme Court in General Term rendered a decree dismissing the bill with costs. (Record, page 15.)

The complainant appealed from the decree.

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The complainant appealed from the decree.

THE FACTS OF THE CASE.

The object of the bill is to impeach a construction of the will of Mrs. Smith, which the parties, upon competent legal advice, originally agreed was the correct one, and which the appellant acquiesced in for more than sixteen years. (Answer, Record, pp. 11, 12, fols. 35–38.)

The facts as disclosed by the pleadings are these:

The Washington Gas Light Company was incorporated by the act of July 8th, 1848, ch. 96, (with a capital stock of $50,000, divided into shares of $20 each,) to manufacture, make, and sell gas for the purpose of lighting the city of Washington, its streets, and houses, and to lay pipes for conducting gas in the streets, avenues, and alleys of the city. (9 Stats., 722.) By the act of August 2d, 1852, ch. 96, the capital stock was authorized to be increased to $350,000, and the company was empowered to extend its operations to Georgetown, (9 Stats., 722,) and by the act of January 3d, 1855, ch. 22, authority was given to increase the capital stock to $500,000, the shares remaining $20 each. (*Ib.*, 835.)

The capital stock of the company, issued under these acts, amounted, as authorized, to $500,000, and consisted, of course, of 25,000 shares of $20 each.

Mrs. Smith, the testatrix, was the owner of 280 of the shares at the time of her death, on March 26th, 1865; and these, by her will, dated February 11th, 1865, she bequeathed to the defendant, (*inter alia*,) as follows:

> "I hereby give, devise, and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the city of Washington, aforesaid, and to her heirs and assigns, two hundred and eighty (280) shares of stock of the Washington Gas Light Company; also forty-five (45) shares of stock of the Franklin Fire Insurance Company, both in the city of Washington, aforesaid; also eight thousand five hundred ($8,500) dollars in Government bonds of the Government of the United States of

America, said stock and bonds, or any portion of them, remaining at my death a part of my said estate; to have and to hold the same in and upon the trusts and provisions following, that is to say: in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds, and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste." (Will of Ann W. Smith, Rec., pp. 4, 5.)

By the act of May 24th, 1866, ch. 96, entitled "*An act to amend the charter of the Washington Gas Light Company*," the capital stock of the company was increased to $1,000,000. (14 Stats., 53.)

The act was as follows:

"SEC. 1. That the charter of the Washington Gas Light Company be, and the same is hereby, amended in the third section by substituting the word 'February' for 'January.'

"SEC. 2. That the capital stock of said company be and the same is hereby increased five hundred thousand dollars, subject to the same liability as is provided in the eleventh section of the original act of incorporation, approved July eighth, eighteen hundred and forty-eight."

On or about the 1st of November, 1868, the board of directors of the company adopted the following resolution:

"Whereas the construction account of this company exceeds one million of dollars, and as the capital of the company has been increased, by an act of Congress, to one million of dollars: Therefore, be it resolved, That the pany on the whole 560 shares, as held in trust under the will of Mrs. Smith." (Answer, Rec., p. 12, fol. 36.)

No demand was ever made by or on behalf of appellant for the transfer to her of the 280 new shares, thus issued in 1868, prior to the filing of this bill in March, 1884. (Answer, Rec., p. 12.)

It appears, by the answer, that the bill has been predicated upon false theories of fact in regard to the increase of the capital stock under the act of 1866.

The bill, in its 7th paragraph, alleges that, after the death of the testatrix, the company accumulated a large surplus of net earnings, which, by October 1st, 1868, amounted to more than $1,000,000, over and above the capital of the company, "which then still remained in fact at the sum of $500,000," and that the company afterwards awarded and distributed such surplus "*in the shape and form of additional shares of stock* to and among its stockholders, share for share, as they stood on the books of said company on the 1st day of October, 1868," and that "by which means, and no other, and in which manner, and no other, the said capital stock was made and brought up, or pretended to be made and brought up, to the sum of $1,000,000; as in and by the act of May 26th, 1866, contemplated, provided, and fixed." (Bill, par. 7, Rec., p. 2.)

These allegations are denied in the 7th paragraph of the answer. (Answer, Rec., p. 8.)

The answer, besides, expressly avers that the *capital* of the company on the 1st day of October, 1868, *had become in fact a million of dollars.* (Rec., p. 9.)

The bill also, in its 8th paragraph, avers that, in accordance with the supposed action of the company, as alleged in its 7th paragraph, "there were awarded and distributed, as to and in the name of the said Ann W. Smith, 280 of the new or additional shares of stock *into* *which the said surplus of said net earnings, etc., had, as aforesaid, been changed, transformed, and converted, and in the shape and form and by means of which the said surplus* had so as aforesaid been awarded, apportioned, and distributed in behalf and on account of those entitled thereto." (Bill, Rec., p. 3.)

The answer, in its 8th paragraph, denies these allegations, and specifically denies "that any such surplus was awarded, apportioned, or distributed in behalf of, or on account of, those entitled thereto, in the shape and form or by means of the said new or additional shares of the stock of said company; and that any such surplus of said earnings, increase, income, or profits existed at the time the said new or additional shares of the said stock were issued, to be changed, transformed, and converted into, or to be awarded, apportioned, or distributed in the shape and form, or by means of the said new or additional shares of the stock of the said company." (Answer, Rec., p. 10, fol. 32.)

The pretension of the bill is, that by the true intent and meaning of the will the appellant is entitled in her own right to the sole and absolute ownership, title, and control of the new or additional 280 shares awarded to the appellee as trustee under the will of the testatrix, in pursuance of the resolution of November 1st, 1868; and it prays a decree for the assignment and transfer of the said shares to her by the appellee. (Bill, Rec., p. 3.)

The answer, on the contrary, maintains that the said shares were not and are not, in law or justice, or as intended in the will of Ann W. Smith, a dividend or income of the original 280 shares bequeathed to the appellee by the will, and that the said new or additional shares belong to the appellee as legatee of the stock in remainder, but subject to the trust to cause the dividends or the income thereof to be paid to the appellant during her natural life. (Answer, Rec., p. 12.)

ARGUMENT FOR APPELLEE.

First Point.

The term "dividends" was evidently used in the will in its ordinary acceptation of moneys paid out of profits by a corporation to its shareholders.

1. The rule is, that when a testator uses a word which has a well-known ordinary acceptation, it must appear very certain that he has said, on the face of the will, that he uses it in another sense, before the ordinary sense can be interfered with.

Lord Cranworth in *Hicks* v. *Sallitt*, 3 DeG. M. and Gor., 793.

The term "dividend," when applied to corporate stock, has a well-understood signification, and imports only a division of money from what the corporation has determined to be income; and that is the legal meaning as well as the popular acceptation of the term.

Bradley, Ch. J., in *Taft* v. *R. R. Co.* (8 R. I., 333), defines the term thus:

> "A dividend is money paid out of profits by a corporation to its shareholders."

Cooley, J., in *Lockhardt* v. *Van Alstyne* (31 Mich., 79), says:

> "A dividend to the stockholders, when spoken of in reference to an existing organization engaged in the transaction of business, and not of one being closed up and dissolved, is always understood as a fund which the corporation sets apart from its profits to be divided among its members. We hazard nothing in saying that this is the primary and universal understanding of a dividend, except when made use of in respect to a final closing up and distribution of assets on the occasion of insolvency, or in view of a dissolution."

The Court of Appeals, in *Hyatt* v. *Allen*, (56 N. Y., 550,) defining the term "dividends," says:

> "This word, when used in reference to corporate stocks, has a technical, but well-understood, meaning, and indicates corporate funds derived from the business and earnings of the corporation appropriated by a corporate act to the use of and to be divided among the stockholders."

Haines, J., in *King* v. *R. R. Co.*, (29 N. J., L. 87), says:

> "A dividend declared of the earnings of a corporation becomes thereupon the individual property of the stockholder, to be received by him on demand; it is a severance from the common fund of the company of so much for the use and benefit of each corporator, in his individual right, which may be demanded by him, and if refused become the subject of an action for money had and received."

It is perfectly evident, from all the words and expressions in this will, that the testatrix used the term "dividends" in its ordinary and primary sense, as above defined. She had never received anything except money as a dividend on her shares; and she knew of nothing else as a "dividend" on those shares. The "dividends," and the only "dividends," before her mind were of the same character as the "interest" on her bonds; and she accordingly directed the appellee to cause both, that is to say, the "dividends" on her stock and the "interest" on her bonds, as they might "accrue," to be "paid" to plaintiff; thus plainly contemplating money, and money only, as the thing receivable, by the appellant, from the stock, as well as the bonds, bequeathed to the appellee.

2. The term "dividends" is obviously used in the same sense, and as meaning the same thing, as the word "income," in the last clause of the paragraph of the will under consideration, which is as follows:

> "And in case of the death of the said Mary Ann Gibbons; then the said stock, bonds, and *income* shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

The profits of a corporation remain, while undivided, part of the fund constituting the *capital* of the corporation, and the interest therein, represented by each certificate of a share of stock, is part of the *capital*, and not of the *income*, of that share, as between those entitled to successive rights in the share.

Minot *v.* Paine, 99 Mass., 101.
Rand *v.* Hubbell, 115 Mass., 474.
Gifford *v.* Thompson, *Ib.*, 480.

It follows, therefore, that until an actual division of its profits by a corporation, there is and can be no "income" of its shares as between a tenant for life and a legatee in remainder. The life-tenant has no right to claim corporate earnings, as income of the trust in his favor, until the corporate authority has voted to distribute them as a dividend.

But it is obvious that even where a corporation purports to declare a dividend, "payable," as the phrase is, in shares of its capital stock, or where a "stock dividend" is "declared out of profits," just what the corporation does not accomplish is a division of its profits, or of any part of the corporate property, among its shareholders.

A stock dividend, as it is called, is, in fact, no dividend at all, and is merely an increase of the number of shares, diminishing their value proportionately.

This was well expressed by Earle, J., in the recent case of *Williams* v. *Western Union Tel. Co.* (93 N. Y., 162), as follows:

> "After a stock dividend, a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such

a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend, they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before."

These views are adopted by Mr. Taylor, in his recent work on the *Law of Private Corporations* (sec. 801), where he says:

"A 'stock dividend' is *no* dividend; no real distribution, either of profits or capital, but merely an increase of the number of shares into which the capital is divided. Consequently, since a 'stock dividend' is no real dividend or distribution of profits, it would seem that even if such 'dividend' were 'declared out of profits,' the stock so issued could not be regarded as income, for it must be conceded that the life-tenant has no right to claim corporate earnings as income of the trust created in his favor until the corporate management has voted to distribute them as a dividend; and if the corporate management decides on declaring a stock dividend, what it really decides on, is not to declare a dividend at all."

Second Point.

But whatever interpretation is placed on the term "dividends," as used in this will, and whatever it may be deemed to embrace, it is clear, under the provisions of the will, that it does not include any newly-created shares awarded to the appellee upon an increase of the capital stock of the corporation.

1. The 280 shares held by the testatrix, at the time of her death, are bequeathed to the appellee upon the trust, during the life of the appellant, to cause the "dividends" to be paid to her "*without percentage of commission or diminution of principal;*" and it is directed that, after her

death, *the stock and income* are to revert to the estate of appellee "*without incumbrance or impeachment of waste.*"

This is not a gift of the *stock* to the appellant; as is well settled.

Read *v.* Head, 6 Allen, 177.
Barrus *v.* Kirkland, 8 Gray, 512.
Atkins *v.* Albree, 12 Allen, 361.

The bequest to the appellant is of the "dividends," or "income," only for life.

The legal property in the shares and the interest they represent in the corporation, its property and franchise, is vested in the appellee by the will.

It is only after a dividend has been made by the corporation from what it has determined to be income, that the plaintiff has any right or is in a position to claim anything.

A testator, who gives personal property in this manner, is held to have the interest of the successive takers equally in view.

Kinmouth *v.* Brigham, 5 Allen, 270.

This will plainly shows, indeed, that the testatrix intended that the interest in the corporation, bequeathed to the appellee, should not be impaired during the life of the appellant; that no part of it should be diverted from the appellee; and that the whole should go intact to the appellee absolutely after the death of the appellant.

2. It is clear, under the will, as thus analyzed, that all new shares awarded to the appellee, on an increase of the capital stock, constitute an integral part of the capital bequeathed to her in trust, and belong to her absolutely on the death of appellant.

The existing shares of the capital stock of a corporation represent all its capital; and within the designation of the capital of a corporation is embraced, not only its "capital stock," but all its property, real and personal, constituting the assets of the corporation, including "money earned by the corporation, unless and until distributed among the stockholders by the corporation."

Rand *v.* Hubbel, 115 Mass., 461.
Gifford *v.* Thompson, 115 Mass., 478.
New Haven *v.* City Bank, 32 Conn., 106.

The capital of a corporation includes its capital stock, but the capital stock embraces only indirectly its capital.

The capital of a corporation, thus defined, is its property; but each shareholder has a vested interest in that capital in the proportion of the shares held by him to the whole number of the outstanding shares of the capital stock of the corporation.

That interest is a distinct and independent interest held by the shareholder, and is his property, and the certificate of stock is the muniment of his title and the evidence of his right. (Van Allen *v.* Assessors, 3 Wall., 573.)

Where new stock is created and the number of shares increased, each share becomes a less proportion of the whole stock than it was before, so that the original shares represent a smaller fractional interest in the corporation, its franchises and property, than they did before the increase of the capital stock.

If, therefore, the "capital stock" of a corporation is increased, by the proper authorities, the right to take the additional shares vests in the shareholders *pro rata;* and when new stock is issued to share equally with the existing stock, it is the right of each shareholder that it shall be so distributed as not to divest him of his vested proportionate right in the corporate property, including the accumulated profits.

This doctrine, first declared in *Gray* v. *Portland Bank*, (3 Mass., 364,) may now be regarded as settled in the law of private corporations.

Eidman *v.* Bowman, 58 Ill., 444.
State *v.* Smith, 48 Vt., 266.
Dousman *v.* Wisconsin, etc., M'f'g Co., 40 Wis., 418.

The right of the shareholders, in respect to new shares, issued on an increase of the capital stock of a corporation, is a benefit, or interest, which attaches to the old *stock*, not as *profit or income, but as inherent in the shares in their very creation.* It is an original incident or attribute appertaining to each share—a right to a larger participation, or ownership, in the capacity of the corporation to earn profits, and not the gain or income itself actually earned by the corporation.

Gray *v.* Portland Bank, 3 Mass., 364.
Atkins *v.* Albree, 12 Allen, 361.

It follows, from these principles, that, by the bequest to her of the legal property in the original shares, the appellee became vested with the legal right to receive, and hold, under the will, as part of the *corpus* of the trust property, a proportionate number of any new shares distributed by the company among the stockholders.

That right was an interest, or benefit, which appertained to the old shares in their original creation, and passed to the appellee by the bequest of those shares, and can no more be diverted from her than any portion of the 280 shares named in ~~her~~ will.

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It is necessary, therefore, that new shares, awarded to the appellee, on an increase of the capital stock of the company, be added to the old, in her hands, as capital, in order that she may retain the same proportionate interest in the whole corporation that she originally held, and that the interest bequeathed by the will may be preserved for her benefit, as legatee in remainder, after the decease of the appellant, in conformity with the intention of the testatrix.

Third Point.

The transaction by which the new shares, issued under the act of 1866, were awarded among the stockholders, was not a dividend, or intended to be a dividend, of profits or income, or anything which could be the subject of a dividend, by the corporation.

1. The transaction, on the part of the company, by which the number of the shares of its capital stock was increased, and the new shares awarded among its stockholders, according to the stock respectively held by them, is evidenced by the resolution of the directors of November 1st, 1868, set forth in the answer.

The resolution was adopted in execution of the act of May 24th, 1866, which declared that the "capital stock of said company be, and the same is hereby, increased five hundred thousand dollars."

The act was passed in view of the fact, that, while the nominal capital of the company was only $500,000, the actual capital in property owned by the company, and employed in the business for which it was incorporated, had become twice that amount; and the purpose of Congress was to constitute the corporate property, or fixed capital, beyond the amount of the nominal capital, a part of the "capital stock" of the company, or, in other words, to capitalize the property, which left the company only to provide for the issuing and distribution of the additional shares representing the legislative increase of its capital stock; and this it did by the resolution of the directors.

The object of the resolution thus was to give effect to the act of 1866, according to law and the vested rights and interests of the stockholders in the property constituting the capital stock of the corporation.

The stockholders had, by law, a vested proportionate right in the corporate property; and the resolution, therefore, awarded the additional shares, representing the increased capital stock, among them, *pro rata*, according to the stock respectively held by them.

The resolution, in effect, therefore, provided for a change of the form of the investment of the shareholders, as contemplated by the act of 1866, leaving the amounts of their respective interests in the capital of the corporation identically the same, after the distribution of the new shares, as they were before the increase of the number of the shares of the capital stock.

2. The directors made no distribution, or division, of the earnings, profits, or income of the company among the shareholders.

The increased stock was not issued in payment of a dividend, or as a dividend, or in lieu of a dividend, or out of, or as representing, net earnings or surplus profits of the company.

It would be a solecism in terms, therefore, to speak of the transaction, on the part of the company, under the act of Congress of 1866, as a dividend, or the new stock as a dividend, or income, payable to the appellant under the will.

Fourth Point.

The shares here in controversy represented, and were awarded to the appellee as representing, an interest in the permanent and capitalized property of the company; and, therefore, they cannot be deemed income of the original shares in the meaning of the will or the meaning of the law, but must be treated as an accretion to the capital held in trust, and which is to go to appellee absolutely on the death of the appellant.

1. It appears, by the answer, that before and after the act of May 24th, 1866, the company invested, from time to time, portions of its net earnings in extensions and enlargements of its works and plant employed in its

legitimate business under its charter, and that the 25,000 additional shares of its capital stock, issued under that act, represented, and were issued by the company as representing, the accretions, thus made, to the permanent property or working capital of the corporation, the actual cost of which amounted, at the date of the act of 1866, to not less than $900,000, and on October 1st, 1868, to more than $1,000,000.

The act of 1866 declared that the capital stock of the compay was thereby increased to $1,000,000.

The "capital stock" of a corporation is the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the amount provided by its charter.

State *v.* Fire Asso., 3 Zabr., 195.
Burrall *v.* R. R. Co., 75 N. Y., 211.
Williams *v.* W. U. Tel. Co., 93 N. Y., 182.

The act of 1866 incorporated the accretions of its property, mentioned in the answer, into the "capital stock" of the company, so that the new shares, issued by the company, represented corporate property, which was actually, and in fact, capitalized by the act of 1866.

But if that be not so, the act of 1866 *authorized* the company to capitalize the increase of its permanent property mentioned in the answer; so that, in that view of the act, the additional shares issued by the company, under the act, represented, when awarded by it among the stockholders, corporate property, which was capitalized under the specific authority of Congress.

In either or any view of the act of 1866, the shares, issued under that act, represented permanent property which became, by and under authority of law, an integral part of the authorized capital stock of the company, and legally constituted, therefore, when issued, accretions of capital in the hands of the respective stockholders.

2. It is immaterial, upon the question of the legal character of the new shares, as capital or income, that the property thus incorporated in the capital stock of the company, and represented by the increased shares, was purchased by it with the earnings, or profits, of its business, which it might otherwise have chosen to divide, as income, among the stockholders.

What is capital to the corporation must, in its nature, be capital to the shareholders.

It cannot be doubted that an improvement company like this, which has earned a sufficient surplus to authorize it to declare a dividend, has power, in the exercise of a fair and honest discretion, either to divide it among the stockholders or invest the money in making improvements and enlarging the working capital of the company, and that this discretion is uncontrollable by the courts.

Pratt *v.* Pratt, 33 Conn., 446.
Minot *v.* Paine, 99 Mass., 107.
Rand *v.* Hubbel, 115 Mass., 474.
Moss's Appeal, 83 Pa., 269.

As was well said by Paxson, J., in Moss's Appeal (83 Pa., 269):

> "From motives of prudence or self-interest it is frequently desirable to add all or a portion of the earnings to the capital. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere."

If such a corporation invest its income in permanent improvements, without increasing the number of its shares, the interest in such improvements represented by shares of its capital stock, settled in trust, would be part of the capital and not of the income of such shares, as between a tenant for life and a legatee in remainder.

So, if the corporation, after such investment of its income, instead of increasing the number of its shares, increase their par value, the shares would be capital, and not income, though increased in value by the application of the income to the capital of the corporation.

It follows, necessarily, therefore, that if the company, having power, by law, to increase its nominal capital, issue newly-created shares to represent the interests of its stockholders in such permanent improvements, and issue the new shares accordingly among the stockholders, as representing the property thus capitalized, the shares of such new stock awarded in respect of any original stock settled in trust for a legatee for life, with remainder over, are, in their nature, capital, and cannot be deemed income of such original shares, belonging to the legatee for life.

Fifth Point.

There is no decision of authority in England, or this country, under which it can be maintained, by the appellant, that the shares in controversy constitute income of the original shares for her benefit under the will of the testatrix.

1. In England the doctrine maintained here on behalf of the defendant is perfectly well settled by the decision of Ch. Baron Alexander in Hooper *v.* Rossiter (1 McClel., 527), and that of Vice-Chancellor Wood, In *re* Barton's Trust (L. R., 5 Eq., 238.)

In the case of *Hooper* v. *Rossiter* (decided in 1824) a testator, by his will, gave his wife for life "*the interest, dividends, profits, and proceeds*" of his Bank of England stock. The Bank, on the occasion of a loan to the Government, augmented its capital stock, and apportioned, by resolution, the additional capital (*eo nomine*) among the shareholders, at the rate of 252 per cent. on the stock they then held. Lord Chief Baron Alexander decided, on a review of all the earlier cases in England, that the increased stock was an accretion to the capital of the trust, and not a dividend, profit, or proceeds, arising or becoming due from the original stock, and that the tenant for life was entitled only to the dividends on the increased stock.

In *re* Barton's Trust (*supra*), decided in 1868, is the leading modern authority in England. The shares in that case, of the India Steam Navigation Company, were settled upon trust to pay A, during her life, "*the interest, dividends, share of profits, or annual proceeds*," and, after her death, in trust for her children. During A's lifetime an addition of three, new, fully paid-up, shares to those already held in trust for her was made by the company, under a resolution of the directors to apply a portion of the net earnings during the half year to necessary works, and issue new shares *to represent the money so applied*, a dividend being declared out of the remaining portion of the earnings. The Vice-Chancellor, afterwards Lord Chancellor Hatherley decided that the additional shares were made capital, and must be treated as such, and that they went in augmentation of the stock. He said:

> "As long as the company have the profit of the half year in their hands it is for them to say what they will do with it, subject, of course, to the rules of the company. The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain."

2. In Massachusetts, where every phase of the question has been thoroughly examined, the reasoning in the case of *Barton's Trust*, was fully adopted in the leading

case of *Minot* v. *Paine* (99 Mass., 101), which established the rule that "cash dividends," however large, were to be regarded as "income," and "stock dividends," however made, as "capital."

That case was preceded by *Atkins* v. *Albree* (12 Allen, 359), in which it was adjudged that the proceeds of the sale by a trustee of stock of a valuable right to subscribe for new stock in the company, were to be held in trust as capital, the *interest* on the amount only going to the life tenant.

In *Minot* v. *Paine* (decided in 1868) the new stock was issued and distributed, as representing expenditures for permanent improvements, from the net earnings of the corporation; and it was held, on the soundest legal logic, that the new stock could not be regarded otherwise than as part of the capital held in trust, which was to go to the legatee in remainder.

Chief Justice Chapman stated the doctrine thus:

> "The money in the hands of the directors may be income to the corporation, but it is not so to a stockholder till a dividend is made; and where the company invests it in buildings and machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvement, for enlarging or carrying on their legitimate business, it never becomes income to the stockholder. The investment becomes an accretion to the capital, and it is equally so whether they increase the number of shares, or the value of the shares, or leave the shares unaltered."

The Supreme Court of Massachusetts has adhered to the rule in *Minot* v. *Paine*, and the doctrines on which it is founded; but, in subsequent cases, where the dividends were made in an unusual manner, it has been required to determine whether they were to be deemed "stock dividends" or "cash dividends," within the principle of that case; and this, the Court has said, depends upon the substance and intent of the action of the corporation, as shown by its votes. (Deland *v.* Williams, 101 Mass., 571; Leland *v.* Hayden, 102 Ib., 542; Heard *v.* Eldridge, 109 Ib., 258; Rand *v.* Hubbell, 115 Ib., 461; Gifford *v.* Thompson, Ib., 478.)

Chief Justice Gray delivered the opinion of the court in *Rand* v. *Hubbell.*

The company, in that case, having increased the number of its shares, the directors declared a cash dividend, which was to be applied in payment by the stockholders for the new shares. No money was paid by the corporation to any stockholder. The Court decided that the new shares were capital, and not income of the old shares.

The subject has been considered also by the Court of last resort in Pennsylvania; but the doctrine of that Court in *Earp's Appeal* (28 Pa., 368), if not expressly overruled, was practically abandoned, in the cases of *Moss's Appeal* (83 Pa., 269), and *Biddle's Appeal* (99 Pa., 282).

Earp's Appeal was decided in 1857, eleven years before the cases of *Barton's Trust* and *Minot* v. *Paine*, and, of course, without the benefit of the discussion in those cases.

As was observed, in *Minot* v. *Paine*, when Earp's Appeal was cited, the fact that the corporation has, within the limits of its charter, the power to withhold dividends, and use all its funds in such a way as merely to increase its property, was not discussed.

In *Earp's Appeal* there was an intended distribution of *profits qua-profits* in the shape and form of new certificates of stock—as Paxson, J., is careful to state in delivering the opinion of the Court in *Moss's Appeal.* He said, in regard to *Earp's Appeal:* "The profits had accumulated until they reached nearly three quarters of a million of dollars. A considerable portion of this surplus was distributed to the stockholders in the shape of new stock.

It was confessedly profits. It was judicially ascertained to be profits after a careful examination by the Master. *The Corporation recognized the transaction as a distribution of profits.*"

The Supreme Court said, in *Moss's Appeal*, that *Earp's Appeal* was exceptional in its character; but it must be seen, however, that while thus distinguishing *Earp's Appeal*, it was practically overruled in *Moss's Appeal*, in which it was adjudged that, where a corporation, having surplus earnings, increased its capital stock, and gave the stockholders the right to subscribe at par for the new stock, and the trustees sold a portion of the options, and with the proceeds purchased some of the increased stock, the new shares thus obtained were capital, and not income of the original shares, and belonged to the residuary legatee.

So, in *Biddle's Appeal* (99 Pa., 282), it was held that the proceeds of the sale of an option to subscribe for new stock were not to be awarded to the life tenant as income, but that they belonged to the principal of the estate. The Court said:

> "The right of a stockholder to subscribe for new stock was a right to change the form of the investment; but that which existed as principal did not, by the exercise or sale of that right, become income. The appellant became entitled to the income on that principal in its changed form, but not to the principal itself."

It will be observed that the fundamental principle of the decision in *Moss's Appeal* and *Biddle's Appeal* is really the doctrine of the Massachusetts cases of *Atkins* v. *Albree* and *Minot* v. *Paine*.

It will also be seen that if *Earp's Appeal* were to be the guide the Court would be obliged to *capitalize* in favor of the legatee in remainder the profits in the hands of the company prior to the date of the creation of the trust.

But *Earp's Appeal* is unsound in principle, and in its reasoning, as has been well shown by Mr. Perry in the note on this subject in his work on *Trusts* (2 Perry on Trusts, p. 81, sec. 545). He says:

> "In short, the assertion of this case that the earnings are the rightful property of the tenant for life, and that no action of the corporation can alter his rights to them, cannot be sustained in practice for the simple reason that nothing belongs to the stockholder until a dividend is made, and until a dividend is made the tenant for life has no rights or ownership to be altered or affected by the action of the corporation."

The nature of what are called stock dividends is considered by the Supreme Court of Georgia in *Millen* v. *Guerrard* (67 Ga., 284), under section 2256 of the Code of that State, which enacts that "the natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the *corpus, such as an issue of new stock upon the shares of an incorporated company,* attaches to the *corpus,* and goes to the remainderman."

The Court held that a dividend declared by a railroad company in certificates of indebtedness, was the natural increase of the stock, and not an accumulation of the *corpus,* in the sense of the Code, and distinguished such a dividend, in nature and principle, from an ordinary stock dividend, which the Court very plainly shows is assimilated to and becomes a part of the original stock, and necessarily goes with it to the legatee in remainder.

It is unnecessary to notice the decisions in some inferior State Courts to the effect that stock dividends declared out of surplus earnings are income, because those cases will not be regarded by this Court as having any weight as authority, and because they are all to a greater or less extent vitiated by the unsound views of the law of corporations found in *Earp's Appeal;* but we believe all the cases of that class, in the books, are cases where the stock was issued as a dividend, *eo nomine,* payable in new shares, and the issue of stock was but another mode of distributing surplus earnings among the stockholders.

It is respectfully submitted, therefore, that the claim of the plaintiff is not maintainable either on principle or authority, and that the 280 shares of the capital stock of the Washington Gas Light Company here in controversy are capital, and belong to the appellee as legatee in remainder, under the will of Ann W. Smith, but subject to the trust created by the will, to cause the dividends thereon, or the income, to be paid to the appellant during her natural life.

J. Hubley Ashton,
Of Counsel for Appellee.